# EAST AFRICAN COURT OF JUSTICE LAW REPORT
# 2012 – 2015

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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 between 2012 and 2015. Each contains a case summary together with a list of legal instruments and cases cited plus the 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

RAOUL WALLENBERG INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

SWEDEN

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The East African Community Staff Rules and Regulations, 2006

## ABBREVIATIONS

| | |
|---|---|
| A.C. | Appeal Cases |
| ACHPR | African Charter on Human and Peoples' Rights |
| AG | Attorney General |
| All E.R. | All England Reports |
| BIF | Brundian Francs |
| Ch. | Chancery Division |
| DPJ | Deputy Principal Judge, EACJ |
| E.A. | East Africa Law Reports |
| EAC | East African Community |
| EAC Treaty | The Treaty for the Establishment of the East African Community |
| EACA | East African Court of Appeal |
| EACJ | East Africa 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 |
| J | Judge |
| JA | Justice of Appeal |
| JJA | Judges of Appeal |
| JJ | Judges |
| K.B. | King's Bench Division |
| K.L.R. | Kenya Law Reports |
| Misc. | Miscellaneous |
| PCIJ | Permanent Court of International Justice |
| P | President of the EACJ |
| PJ | Principal Judge, EACJ |
| Q.B. | Queen's Bench Division |
| SC | Supreme Court |
| SG | Secretary General |
| TLR | Tanzania Law Reports |
| U.L.R | Uganda Law Reports |
| UPRONA | Union pour le Progrès National |
| v | versus |
| VP | Vice President, EACJ |
| W.L.R. | Weekly Law Reports |

East African Court of Justice – First Instance Division
Claim No.1 of 2012

**Angella Amudo And The Secretary General of the East African Community**

Jean-Bosco Butasi, PJ, John Mkwawa (Rtd), J, Faustin Ntezilyayo J.
September 26, 2014

*Council's decisions are binding on the Secretary General - Staff recruitment - Special damages- Ultra vires actions- Whether Claimant was a professional staff member entitled to a five year fixed contract.*

*Articles: 14(3) (a), (c), (d), (g), 31, 70(2) of the EAC Treaty - Regulation 22(1) (c), 23(8) of the EAC Staff Rules and Regulations, 2006.*

In September, 2008, the Claimant, who is a professional accountant, was appointed by the Council of Ministers of the East African Community as a Project Accountant of the Respondent to replace the then Project Accountant who had resigned before the end of his contract five - year contract. The Claimant was given a contract for twenty months. Subsequent to her appointment, the Respondent implemented Council's decision by notifying the Claimant that she had been appointed, not as Professional Staff, but as a Project Accountant attached to the EAC Secretariat funded under Regional Integration Support Agreement (RISP) Project and therefore she was not a regular staff member under EAC Staff Rules and Regulations (2006), except where it was specified so in that contract. The Claimant averred that her appointment was in scale P2 under the EAC Staff Rules and Regulations, 2006. The Claimant averred that by issuing her with a contract of twenty months instead of a fixed five-year contract that was renewable once, the Respondent misrepresented the Council's decision. When the Respondent failed to address her concerns, she filed this Claim.

The Claimant also asserted that the existing policies of the Council of Ministers were violated when she was given short periodic renewals of the contract at the discretion of the Respondent and that her term of employment was prematurely terminated. She sought *inter alia*: a declaration that the appointment for an initial twenty two months and the periodic extensions of the appointment were *ultra vires* the powers of the Secretary General; and that she was entitled to a contract of employment for a period of five years plus special damages for loss of earnings for the remaining period of seventy eight months.

The Respondent contended that the Claim was time-barred; that the Claimant was a project staff with a contract under the Regional Integration Support Agreement (RISP) and therefore was not entitled to a five year contract.

**Held:**

1) The appointment of the Claimant for an initial period of twenty months and subsequent periodical extensions up to 30th April 2012, were *ultra vires* the powers of the Secretary General and his deputies and inconsistent with the EAC Staff Rules and Regulations ,2006;
2) The Claimant's letter of appointment as Project Accountant under RISP was not in conformity with the Council's decision. And the Claimant was entitled to a contract of employment for five years in accordance with EAC Staff Rules and Regulations;
3) The Claimant was granted special damages for loss of earning in the sum of USD 9, 024.00 and awarded half of the taxed costs.

**Cases cited:**

Georges Wanyera v. Kabira Sugar ltd, 1985, HCT-C.S.-0058-1997, High Court of Uganda at Jinja

Tumusiime Fidelis v. Attorney General, Civil Suit No.88 of 2003, High Court of Uganda

White & Carter (Council) Limited v. MC Gregor (1962) A. C. 413

**Editorial Note**: In Appeal No 4 2014, the Appelllate Division dismissed the appeal holding that: the Claimant was not an employee of the Community when the claim was instituted; the claim was time-barred; and the entire proceedings were a nullity.

**Judgment**

**Introduction**

1. The instant Claim has been instituted by Angella Amudo (hereinafter referred to as the "Claimant"). The Claim is against the employer, the East African Community (hereinafter referred to as the "Respondent"). The Claim is dated the 25th September, 2012 and was filed on 27th July, 2012. Basically, it is premised under Article 31 of the Treaty for the Establishment of the East African Community (hereinafter referred to as the "Treaty"). In essence, the matter now before this Court is an employment dispute.
2. At all material time, the Claimant was residing at the Olorien Road in the city of Arusha in the United Republic of Tanzania.
3. The Respondent is the Secretary General of the East African Community who is sued on behalf of the East African Community in his capacity as the Employer of the Claimant.

**Representation**

4. The Claimant was represented by Mr. James Nangwala from the firm of Ms. Nangwala, Rezida & Co. Advocates located at Suite No. B5 2nd Floor Office Park Building (Buganda Road Office) Plot No.7/9 Buganda, Road P.O. Box 10304 Kampala, Uganda.
5. Mr. Stephen Agaba, Principal Legal Officer at the East African Community appeared for the Respondent.

**Background**

6. On 13th September, 2008, the Claimant who is a professional accountant was appointed by the Council of Ministers of the East African Community during its 16th Meeting, as a Project Accountant of the Respondent. It is common ground that she was recruited to replace one Mr. Ponziano Nyeko who was the then Project Accountant with a five- year contract, but had resigned before the end of his contract. The Claimant as it is evident from the record, assumed duty on 1st November, 2008. It is the Claimant's case that her appointment fell in the category of professional staff and that the conditions of service of members of staff of the Respondent are defined by Staff Rules and Regulations (2006) made pursuant to the Treaty.
7. It is apparent that subsequent to her appointment, the Claimant was put on notice that the position of Project Accountant was not in established positions governed by the Staff Rules and Regulations, 2006.
8. Noting the misrepresentation of the Council decision, the Claimant then raised her concern in writing before the Respondent. Failing to get redress thereafter, she filed this Claim.

**The Claimant's Case**

9. In the statement of the Claim, the Claimant alleged that she was recruited as a Professional Staff within the scale of P2 under the EAC Staff Rules and Regulations. She further averred that having been recruited as a Professional Staff, she was entitled to a five-year contract renewable once for a further five years ex debito justitiae. She further contented that she was a staff of the Community and not a Project Staff of the Community and that her recruitment followed the resignation of a Project Accountant, one Mr. Ponziano Nyeko who had been on a five-year contract. The Claimant further asserted that when she was in service, she was earning a salary of USD 6,128.00 (US dollars six thousand one hundred twenty eight) per month.
10. The Claimant maintained that the Respondent acted *ultra vires* his powers and mandate contrary to Regulation 22(1)(c) of the EAC Staff Rules and Regulations (2006), in implementing the decision of the Council of Ministers. He gave the Claimant a contract with a tenure of twenty two months instead of a fixed five-year contract renewable once for another five years.
11. It was also her case that, contrary to the EAC Staff Rules and Regulations (2006) and in violation of the established existing policies of the Council of Ministers, she was given short periodical renewals of the contract at the discretion of the Respondent or his authorized deputies.
12. The Claimant further complained of mistreatment including being denied wages as is evident from her complaint and of the prematurely ending of her term of employment.
13. Finally, the Claimant averred that having been aggrieved by the aforesaid acts, she petitioned the Respondent praying that her complaints be referred to the Council of Ministers for consideration.
14. In light of the foregoing, the Claimants prayed for the following: "
    A. A declaration that the tenure of appointment given to her initially for a period of twenty (20) months and subsequent periodical extensions of the appointment up to 30th April, 2012, were *ultra vires* the powers of the Secretary General and his

deputies and inconsistent with the EAC Staff Rules and Regulations (2006);

B. A declaration that she was entitled to a contract of employment for a period of five (5) years from the date of assumption of duty renewable once for another five (5) years;
C. Special damages for loss of earnings for the remaining period of seventy eight months (78), totaling to USD 477,984;
D. General damages for pain and suffering and mental anguish as a result of the conduct of the Respondent;
E. Aggravated and/or punitive damages for the wanton conduct of the Respondent's executive officers; and
F. Costs of the Claim on a full indemnity basis with interest thereon."

15. The Claimant's claim was supported by her Statement on Oath filed on 11th March 2013 and oral and written submissions.

**The Respondent's Case**

16. In his response, the Respondent refuted the Claim on the following grounds:
"Firstly, that by way of a Preliminary Objection pleaded that the instant Claim was time-barred;
Secondly, that the claimant was a project staff who was on a contract governed under the Regional Integration Support Agreement (RISP);
Thirdly, that the Programme that the Claimant was holding did not entitle her to a five-year contract with a possibility of renewal as alleged by her;
Fourthly, that the position of a Project Accountant was created by the Council of Ministers and not by the Secretariat as alleged at its 11th Meeting held on 28th March to 4th April 2006 in Arusha, Tanzania;
Fifthly, that the Claimant during her tenure period of service earned USD 6,128.00 per month instead of USD 4, 440 which is earned by an EAC employee on the P2 position;
Sixthly, that the Claimant did not for the entire duration of her contract with the Respondent make any attempt to claim the review of her terms and duration; and
Finally, the Respondent prays that the Claim against the Respondent be dismissed with costs."
17. The Respondent's case was support by an Affidavit of Dr Julius Tangus Rotich, the then Deputy Secretary General in charge of Political Federation (EAC), an Affidavit of Mr. Joseph Ochwada, Director of Human Resources and Administration (EAC), an Affidavit of Mr. Juvenal Ndimurirwo, Acting Director of Finance and oral and written submissions.

**Scheduling Conference**

18. At the Scheduling Conference held on 1st February, 2013, it was agreed, that the following were the issues to be determined by the Court:

1) Whether the Claimant is time-barred under Article 30(2) of the EAC Treaty;
2) Whether the Claimant was a staff member governed by the EAC Staff Rules and Regulations (2006);
3) Whether the position of Project Accountant that the Claimant held would entitle

her to a five year contract with a possibility of renewal;

4) What remedies are available to the Parties?

In addition, the Parties agreed upon to adduce oral evidence and to submit to Court written submissions.

**Determination of the Issues**

Issue No1: Whether the claimant's claim is time-bared under article 30(2) of the EAC treaty

19. This issue was the subject of Application No.15 of 2012 (arising from Claim No.1 of 2012 – The Secretary General of the East African Community vs. Angela Amudo) in which the Court found that the claim was not time-barred.

Issue No.2: Whether the Claimant was a staff member governed by the EAC Staff Rules and Regulations, (2006)

20. On this issue, Counsel for the Claimant submitted that the implementation of the decision of the Council of Ministers held on 13th September 2008 and relating to the appointment of a professional staff of the Secretariat to the position of Project Accountant at grade P2 was *ultra vires* the powers of the Respondent and inconsistent with the EAC Staff Rules and Regulations, (2006).
21. Counsel for the Claimant in his endeavor to demonstrate the powers vested in each organ of the Community referred us to Article 14(3) (a), (c), (d), and (g) of the Treaty.
22. It is the Claimant's position that the *sub-judice* matter being an employment dispute, any evidence in support or against the Claim must comply with Staff Rules and Regulations, Council directives, decisions, recommendations and opinions taken in accordance with Article 16 of the Treaty in as much as they are binding on the Respondent.
23. Counsel for the Claimant further contended that all staff of the Secretariat are appointed on contract and in accordance with the Staff Rules and Regulations and the Terms and Conditions of Service of the Community pursuant to Article 70(2) of the Treaty.
24. Counsel for the Claimant averred that after a number of processes which included a vacancy that occurred after resignation of one Mr. Ponziano Nyeko, the Claimant was appointed by the Council during its Meeting of 13th September, 2008 to the position of Project Accountant under Grade P2. Furthermore, Counsel for the Claimant added that the aforesaid appointment falls under category of Professional Staff as laid down in Regulation 18 of the Staff Rules and Regulations.
25. Counsel then referred the Court to the Claimant's Letter of Appointment as a Project Accountant under RISP funding, dated 29th September 2008 to demonstrate that it did not reflect the Council's decision. In this regard, Learned Counsel pointed out that as per the Council Meeting Report dated 13th September 2008, the Claimant was not recruited under RISP.
26. In support of his written submissions, Counsel for the Claimant referred the Court to some authorities to wit: *Cheshire and Fifoot's Law of Contract, 9th Edition* by M.P Furmston published by London Butterworth 1976 No.7 where the learned author laid down that:

"……. If the contract is lawful in its formation, but one Party alone intends to exploit

it for an illegal purpose, the law not unnaturally takes the view that the innocent Party need not be adversely affected by the guilty intention of the other."

As consequences of such a kind of contract, the same author further pointed out that:

"The situation envisaged here is that contract is lawful ex-facie and is not disfigured by a common intention to break the law, but that one of the Parties, without the knowledge of the other, in fact exploits. it for some unlawful purpose. In these circumstances, the guilt Party suffers the full impact of the maxim *ex-turpi causa non oritur* action and all remedies are denied to him……

On the other hand, the rights for the innocent Party are unaffected."

27. According to Counsel for the Claimant, the above principle applies to the Claimant's contract to the extent that the Staff Rules and Regulations provide for a written contract in recruitment or appointment of any employee. However, the existence of a contract like the one at hand was lawful ex-facie whereas the Respondent misrepresented its formation and implementation for unlawful purpose to limit the tenure of the Claimant for reasons only known by the Respondent.
28. Relying on the authority in S*cott- vs. Brown Dowering, NC Nab & Co. [1892] 2Q.B 728* where it is stated that:

"No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is dully brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality,"

29. Counsel for the Claimant consequently submitted that the latter was appointed as a Professional Staff for the Secretariat in accordance with the Staff Rules and Regulations. In conclusion, Counsel for the Claimant invited the Court to answer Issue No.2 in the affirmative.
30. In response to the foregoing, Counsel for the Respondent vehemently opposed the claim and contended that the Claimant was not a staff member governed by the EAC Staff Rules and Regulations (2006), and that instead, the Claimant's contract was concluded under RISP. However, Counsel for the Respondent agreed with Counsel for the Claimant on the fact that the nature of the *sub-judice* matter is an employment dispute that would be resolved by the interpretation of the Staff Rules and Regulations, Council directives, decisions or its recommendation and opinions. He further invited the Court to apply those principles in addressing the dispute. Counsel for the Respondent thereafter asserted that according to Regulation 20(2) of the Staff Rules and Regulations, 2006:

"No recruitment shall be undertaken unless the approved vacancy exists in the establishment of the Community…."

31. Learned Counsel added that, while implementing the above Regulation, the Council approved proposed positions in EAC for all the organs (Secretariat, EACJ, EALA) at its 12th Meeting held on 25th August, 2006, but the Project Accountant's position was not among those established positions. He further referred the Court to Council decision EAC/C M 12/Decision 76 for more details and to the testimony of the one Mr. Ochwada, Director of Human Resources and Administration of the EAC Secretariat at the hearing of 6th February, 2014 where the latter stated that the approved established structure by the 12th Council Meeting is still in force whereas

the Claimant told the Court during her cross examination that the said structure may have been revised or updated.

32. It was the argument of the Counsel for the Respondent that the Claimant was put on strict proof to substantiate how the Project Accountant's position falls under the EAC Staff rules and Regulations, (2006) and that twice, during the hearing of 11th November, 2013 and her cross-examination, she affirmed that the position of Project Accountant was outside the approved position.
33. Counsel for the Respondent went on to say that the position of Project Accountant was not a creation of the Secretariat as alleged by the Claimant; rather, the position came out from Council's decision EAC/CM 11/Decision 125 when the Council, at its 11th Meeting, approved the recruitment of a Project Accountant for the lifespan of RISP. It was, therefore, the Respondent's case that when the Council passed the above decision, it expressly specified that the Project Accountant was appointed for the duration of RISP. Counsel for the Respondent averred that job advertisement (REF: EAC/HR/07-08/028 - Project Accountant) clearly stated that the Project Accountant's position fell in the project category in the strict line of the above Council's decision.
34. Counsel for the Respondent argued that, when the Council appointed the Claimant to the position of Project Accountant at its 16th Meeting held on 13th September, 2008, it knew that the position was not among the established positions approved in 2006. He therefore submitted that it is unfair to allege that the Respondent acted *ultra vires* his powers and contrary to the Staff Rules and Regulations while implementing the Council's decision. It is Counsel's further submission that in his capacity of Principal Executive Officer of the Community and in accordance with Article 71(l) of the Treaty, the Respondent exercised powers conferred on him in recruiting the Claimant to the Project Accountant's position funded by RISP and governed by a Cooperation Agreement. The Court was afterwards referred to several similar decisions taken by the Council, but we do not deem it necessary to reproduce them.
35. Counsel for the Respondent also argued that the Claimant was even given a chance to consider the terms and conditions of her offer of appointment and the latter gave her consent in writing on 29th September, 2008, by signing the employment contract.
36. According to Learned Counsel, in so doing, the Claimant found the terms and conditions of service fair enough and that would explain why she did not terminate her contract or sought legal interpretation of relevant provisions of the EAC Rules and Regulations from the Counsel to the Community (C.T.C). In addition, Counsel for the Respondent relied on the case of "*Hall vs. Woolston Hall Leisure Ltd" [case No: EATRF/1998/0297*], to stress that the instant employment contract was legal, in as far as the Appointing Authority acted within its powers to approve recruitment of the Claimant pursuant to Article 14 of the Treaty.
37. Counsel for the Respondent further referred the Court to practice of other international organizations in particular the African Union Staff Rules and Regulations, and the United Nations Administrative Instruction ST/A1/2010/4/Dev.1 and to authorities to wit: *Hall vs. Woolston Hall Leisure Ltd (Supra), L. Estrange vs. F. Graucob Ltd [1934] 2 kb 394, Peepay Intermak Ltd vs. Australia and New Zealand Banking Group Ltd [Care No: A3/2005] Kengrow Industries Ltd vs. Chdaran [Civil Appeal No.7 of*

*2001], Namyols Josephine vs. National Curriculum Development Centre [2008] HCT-00-CV-0122-2008 and Pan African Insurance Company (U) Ltd vs. International Air Transport Assoc. 00-cc-cs-0667 of 2003*.

38. In this regard, Counsel for the Respondent invited the Court to apply the above Rules and Regulations as well as the aforementioned authorities.
39. With due respect to Counsel, we find that the said Rules and Regulations are not best practices applicable to any international organizations. As for the authorities, we did not find them relevant to this Claim.
40. Finally, Counsel for the Respondent invited the Court to answer Issue No.2 in the negative.

**Decision on the Issue No.2**

41. We have seen elsewhere above that both Parties are in full agreement that the Staff Rules and Regulations (2006), Council directives, decisions, recommendations and opinions will apply *mutatis mutandis* to this instant Claim. In this regard and for a gradual analysis of a set of facts within the *sub-judice* Claim, it is important to examine this case from the first step related to the job advertisement to the last phase of signing the employment contract by the Claimant.
42. Firstly, it cannot be gainsaid by any Party to this Claim that either the Statement of Claim filed before this Court on 27th September, 2012 or the Respondent's Statement of defense to the Claim lodged in the Court on 18th October, 2012 contain an identical job advertisement to wit: [REF: EAC/HR/07-08, 028] – PROJECT ACCOUNTANT (1 POST). Nothing in this job advertisement would have suggested that the Project Accountant's position was governed by the RISP agreement. Besides, it is worth noting that Learned Counsel for the Respondent, in his written submissions, referred the Court to EAC/CM11/Decision 125, by which the Council approved the recruitment of a Project Accountant and a Budget Assistant during the lifespan of the project.
43. We hasten to say that the latter reference is not helpful enough, in as much as it does not tell us whether that position was governed by RISP agreement and in the absence of such a precision, the Court cannot make any deduction from facts. The group of words "lifespan of the project" at this preliminary stage is neither meaningful nor helpful unless we pursue the analysis of the whole process of the recruitment.
44. Secondly, on 8th and 9th September, 2008, the Finance and Administration Committee met and analyzed among other items the appointment of Professional Staff for the Secretariat. It is compelling to recall that the Deputy Secretary in charge of Finance and Administration personally attended the meeting where the Committee "noted that the process of recruiting suitable persons to fill in the positions of Project Accountant and Senior Engineer/Planner – Communications for Secretariat following the resignation of Mr. Pontiano Nyeko and Eng. Enock Vonazi had been completed." Then, the Finance and Administration Committee recommended to the Coordination Committee to consider and submit to the Council the appointment of Ms. Angella Amudo and Mr. Robert Achieng to the respective Professional Staff positions of Project Accountant and Senior Engineer/Planner.
45. The above recommendation of the Finance and Administration Committee, which comprised the Deputy Secretary General in charge of Finance and Administration, is

not disputed by the Respondent.

46. Thirdly, the Council held its 16th Meeting in Arusha on 13th September, 2008 on the basis of the Coordination Committee's Report, considered among other issues the recruitment of Professional Staff. It is further worthy noting that during that meeting, the Council, as recommended by the Coordination Committee and by its decision EAC/CM 16/Decision 41, appointed Ms. Angella Amudo to the position of a Project Account as a professional staff.
47. We also noted that on the same date, the Council appointed Mr. Leonard M. Onyonyi, Benoit Bihamiriza and Didacus, B. Kaguta to the respective positions of Peace and Security Expert, Conflict and Early Warning Expert and Peace and Security Officer under AU Funding. At this stage, one may pause and ask why there has been a clear distinctiveness of those appointments made the same day.
48. Fourthly, when on 29th September, 2008 the Respondent came to implement the above Council's decision; he informed Ms. Angello Amudo that she had been appointed as Project Accountant, not in the category of Professional Staff but as a Project Accountant attached to the EAC Secretariat funded under RISP Project. It is indicated in the said letter that the appointee was not to be considered as a regular staff member under EAC Staff Rules and Regulations (2006), except where it was specified so in that contract.
49. For ease of reference, we reproduce hereinafter the first paragraph of the aforesaid letter:
    "Following the approval of the 16th Ordinary Council of Ministers Meeting held on 13th September, 2008, I have the pleasure to inform you that you have been appointed as Project Accountant, under RISP funding with effect from 1st October, 2008 ……"
50. At this juncture, we ask ourselves whether the Council's decision was properly implemented by the Respondent.
51. It is evident for both Parties to the Claim that the Council of Ministers is the Appointing Authority of Professional Staff as required by Article 70(2) of the Treaty which states that:
    "All staff of the Secretariat shall be appointed on contract and in accordance with the staff rules and regulations and terms and conditions of service of the Community."
52. In addition, Article 14(3)(g) of the Treaty provides that:
    "…..the Council shall make staff rules and regulations and financial rules and regulations for the Community."
53. We have seen elsewhere in this judgment that the Council appointed Ms. Angello Amudo to the position of Project Accountant as a Professional Staff, whereas the Respondent's notification letter indicated that the Claimant was recruited as a Project Accountant under RISP. One may thus ask whether the Respondent is vested with powers to amend or review a Council's decision. Articles 9 and 16 of the Treaty do not provide for such a competence.
54. Indeed, Article 9 of the Treaty provides for organs of the Community and the Secretariat is one of them. Article 9(4) states as follows:
    "The organs and institutions of the Community shall perform the functions, and act within the limits of the powers conferred upon them by or under this Treaty."

55. As for Article 16 of the Treaty, it provides that:
"….the regulations, directives and decisions of the Council taken or given 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 Assembly….."
56. Consequently and from the reading of the said Article, it is our understanding that the Staff Rules and Regulations (2006) as well as Council's decisions are binding on the Respondent and we do not find why and with which authority the Council's decision was distorted by the Respondent.
57. Furthermore, the basic rights, duties and obligations of the staff members of the Community are enshrined in Staff Rules and Regulation (2006). As regards the appointment of EAC Staff, Regulation 23(8) points out that "The Council shall appoint the Registrar, the Clerk, Counsel to the Community and other Professional Staff in accordance with the relevant provisions of the Treaty."
58. Regulation 22(1), (c) goes beyond the appointment and specifies that all Professional staff shall be appointed on a five-year contract, which may subject to satisfactory performance, be renewed once by the Council.
59. Handmaidens to the Treaty, the Staff Rules and Regulations afford a high degree of attraction and protection of the EAC Staff. It is the spirit of Regulation 1 of EAC Staff Rules and Regulations. From the analysis of the facts, relevant provisions of the Treaty and EAC Staff Rules and Regulations, there is no flicker of doubt that the Claimant was appointed by the Council to the position of Professional Staff under EAC Staff Rules and Regulations.
60. Nevertheless, we are still eager to find out what caused an about-turn of the Respondent. Therefore, at 6th February 2014 during the cross-examination of the witness of the Respondent, one Mr. Ochwada, Director of Human Resources and Administration to the Community, a specific question was put on him by Counsel for the Claimant as follows:
"Mr. Nangalwa: Let me ask it this way: was this recommendation for Angella Amudo outside the Staff Rules and Regulation?
Mr: Ochwada:My Lords, I want to make it clear that appointments of this nature of Professional staff obviously have to be approved by the Council.
Mr. Nangwala: Now, answer my questions.
Mr. Ochwada: It was within the Staff Rules and Regulations as far as the recruitment was concerned."
61. As to whether Ms. Angella Amudo was recruited to the position of Professional Staff and whether the position is an established position under Staff Rules and regulations, the answer of Mr. Ochwada was unambiguous: "The Council appointed the above named person to the respective professional staff position. It is clear; the professional staff is an established position."
62. Moreover, as whether in the appointment of Mr. Leonard Onyonyi, Mr. Benoît Bihamiriza and Mr. Didacus P. Kaguta, it was specified that they were appointed under AU funding, whereas in the appointment of Ms. Angella Amudo and Mr. Robert Ochieng, such mention was missing, Mr. Ochwada reacted as follows:
"My Lords, I was not concealing but the drafting, whoever drafted the Minutes and it came out but, nothing was concealed. Some details may have just been erroneous left

out. I just said that there were details which were left out erroneously but it was not an error."

63. In the event that, the appointment was an error as Mr. Ochwada underscored it to be, it should have been taken to the Council for review as it has been the case for the appointment of Senior Administrative Officer (P2) (see *EAC/CM/Decision 36*).
64. Finally, it is our finding that the letter of appointment of Ms. Angella Amudo as Project Accountant under RISP was not in conformity with the Council's decision.
65. In view of all the foregoing, we answer Issue No.2 in the affirmative.
    Issue no.3:Whether the position of the Project Accountant that the Claimant held would entitle her to a five year contract with a possibility of renewal
66. The main thrust of the Claimant's submission is that she was recruited as a Project Account under EAC Staff Rules and Regulations.
67. In support of his stance, Counsel for the Claimant referred the Court to the Scheduling Conference Notes, especially on point of agreement No.4 where it was agreed upon that:
    "The Applicant's appointment with the Respondent fell in the category of Professional Staff."
68. On the basis of the foregoing, Counsel further referred us to Regulation 22(1) (c) which states that:
    "All Professional Staff shall be appointed on a five year contract, which may, subject to satisfactory performance, be renewed once by the Council."
    He consequently urged the Court to answer issue No.3 in the affirmative.
69. Council for the Respondent, on his part, contended that the Claimant's case was flimsy and the evidence provided was inadequate to enable the Court to rule against the Respondent. It was his submission that the Claimant was employed as a Project Accountant; a position which was not listed as an established position as per EAC Staff Rules and Regulations, 2006.
70. Learned Counsel averred that project positions are funded by various EAC Development Partners governed by different Cooperation Agreements concluded between EAC and such other Partners.
71. He further argued that for officers working under projects, their terms and conditions of work as well as the duration of their contracts are governed by Cooperation Agreements between EAC and Development Partners, and that this is clearly indicated on paragraph 1 of the notification letter of the Claimant's appointment as reproduced elsewhere in this judgment.
72. According to Mr. Agaba, Counsel for the Respondent, there was no misrepresentation or fraudulent intent from the Respondent and, therefore, Counsel submitted that it would be illogical to conclude that the Claimant was entitled to a five-year contract as alleged, and that instead, she was recruited for the duration contained in her contract. Counsel maintained that the Claimant is bound by her signature appended on the contract since at any material time; she was not coerced or put under any form of duress at the time of signing the contract.
73. To fortify his argument, Counsel referred the Court to the doctrine of Estoppel as set out by Court of Appeal case decided in 1988: Litwin Construction (1973) Ltd, 29 BCLR (2(d)) where the crucial question in an employment contract would be:

"Has the Party against whom the estoppel is Claimant affirmed the contract unequivocally by his words or conduct in circumstances making it unfair or unjust for him now to resile from that contract?"

74. Counsel for the Respondent argued that the Claimant had read and agreed with the terms and conditions of her contract and besides enjoyed it. It is the thrust of Counsel's argument that she cannot now, after the end of her tenure, come and challenge the employment contract.

**Decision on the Issue No.3**

75. From the outset, we wish to point out that it is not in dispute that Regulation 22(1)(c) provides for a renewal of contract for all professional staff by the Council.
76. It was also an agreed fact, during the Scheduling Conference, that the Applicant's appointment fell in the category of Professional Staff and that she was recruited to replace Mr. Nyeko who was the then Project Accountant with a five year contract governed by the EAC Rules and Regulations.
77. We heard Counsel for the Respondent stressing that the Claimant was recruited as a Project Accountant under RISP as indicated in the advertised job position. But from the reading of the said advertisement, no such an indication can be found. Moreover, as we earlier on found after a deep analysis of the matter, the Claimant was recruited as a Project Accountant under a Professional Staff position governed by EAC Staff Rules and Regulations.
78. In the light of the foregoing and basing on Article 16 of the Treaty, there is no way that the Council's decision would be disregarded in favour of an advertisement notice of a job position or a notification letter which does not conform with the said decision since this would be tantamount to negating powers of the Council.
79. Having so found and held, we are also of the firm view that the refusal by the Respondent to respond to any of the Claimant's protestation about her employment status is administratively unjustifiable and that the continuing renewal of her short term contract was inconsistent with the Council's decision.

    Given all our findings on this issue, we are now of the settled view that Issue No.3 is answered in the affirmative.

    Issue No.4: What remedies are available to the Parties?
80. It was the Claimant's submission that she is entitled to the remedies sought and any other entitlements that she would have under Staff Rules and Regulations.
81. Learned Counsel for the Claimant then urged the Court to make the following declarations that:
    A. The tenure of appointment given to Claimant initially for a period of 20 months and the subsequent periodic extensions of the appointment upto to 30th April 2012 were *ultra vires* the powers of the Secretary General and his Deputies and inconsistent with the Staff Rules and Regulations of the Respondent;
    B. The Respondent was entitled to an employment contract of 5 years from the date of assumption of duty renewable once for another five years;
    C. The Claimant is entitled to special damages for loss of earning in the sum of USD477,984;
    D. The Claimant is entitled to general damages as per paragraph 23 (ii) hereof;

E. The Claimant is entitle to aggrieved damages for the wanton conduct of the Respondent's Executive Officers; and
F. The Claimant is entitled to costs of the Claim on a full indemnity basis with interest thereon.

82. The above prayers are contained in the Statement of Claim; but other prayers were added in the Claimant's written submissions without leave for amendment as required by Rule 40 of the Court's Rules of Procedure. Therefore, we are bound by the Rules in resolving the instant Claim and we will only consider prayers contained in the Statement of the Claim.
83. As to whether the Claimant is entitled to remedies sought, Counsel for the Respondent submitted that the Claimant was legally employed with a binding initial appointment of 3 years, with subsequent short term contracts and was provided notice of non-renewal of contract.
84. Counsel for the Respondent contended that the contract duration was specified to last at least 2 years and the Claimant was given termination notice.
85. Counsel for the Respondent asserted that the Claimant had never complained about the duration of her contract before the expiry of the initial contract which ran from October, 2008 to June, 2010. He finally submitted that there was no wrongful termination and that, subsequently, the Claimant is not entitled to any remedy.

**Decision on the issue no.4**

86. We have given due consideration to the rival pleadings and submissions from both Parties and at this juncture, we have this to say:
87. Having answered the Issues Nos. 2 and 3 in the affirmative, prayers (A) and (B) are allowed.
88. Prayer (C) is in respect of special damages and at this point, there is need to define what special damages are before we resolve it.
89. *Black's Law Dictionary* defines special damages as:
"Damages that are alleged to have been sustained in the circumstances of a particular wrong. To be awardable, special damages must be specifically claimed and proved."
90. It follows the above definition that special damages are based on measurable amounts of actual loss. Before determining prayer (C), we would like to say that it is composed of two limbs. The first limb is related to the loss incurred during the remaining 18 months of her five year contract. The second limb implied the loss for the expected renewal of the Claimant's contract.
91. In respect of the first limb, the Claimant was appointed by Council of Ministers for a period of five years in accordance with Regulation 22(1) (c); that is to say that she was to serve 60 months and was entitled to all benefits provided for under Staff Rules and Regulations, 2006. However, by virtue of misrepresentation of her employment contract, she was offered to serve as a Project Accountant under RISP funding on 29th September, 2008 and assumed duty on 1st November, 2008. Now, being compensatory, special damages must be calculated by balancing what she had been earning in her position of Project Accountant and what she would have been paid as a Professional Staff P2 during the entire period that she served the Community. In doing so, a real loss incurred by the Claimant will be reached and redressed.

92. If the Claimant was to serve a five year contract as a Project Accountant governed by EAC Staff Rules and Regulations, she would have been paid USD 4,440.00 (United States of America dollars: Four thousand, four hundred and forty only) per month and USD 266,400.00 (United States Dollars: Two hundred and sixty six thousand, four hundred only) for the duration of her contract (60 months).
93. This basic salary of USD 4,440.00 (United States of America dollars: Four thousand, four hundred and forty only) was given in all pleadings by Counsel for the Respondent and it has never been disputed by Counsel for the Claimant who instead constantly focused on the position of a Project Accountant; Professional Staff member under EAC Staff Rules and Regulations.
94. As a Project Accountant under RISP funding, the Claimant was paid a consolidated package of USD 6,128.00 (United States of America dollars: Six thousand, one hundred and twenty eight only) per month. For the service rendered to the Community, the Claimant has been paid an amount of USD 257,376.00 (United States of America dollars: Two hundred and fifty seven thousand, three hundred and seventy six only). From the following computation, it is obvious that the loss incurred by the Claimant as per misrepresentation of the Council decision by the Respondent is the balance between amounts USD 266,400.00 – USD 257,376.00. As a result, special damages sought in this Claim are allowed up to USD 9,024.00 (United States of America dollars: Nine thousand and twenty four only).
95. As to the second limb, the Claimant was to serve a five year contract; her contract would have run from 1st November, 2008 to 1st November 2013. The renewal of her contract was subject to satisfactory performance [see Regulation 22(1), (c)]. That is to say that it was not such an automatic renewal; rather, it was subject to a performance appraisal. Hence, to address the matter of contract renewal would be purely speculative and we decline to go that route.
96. We also know and it is undisputed that the Claimant has been serving on short employment contract terms from 1st July, 2010 to 30th April, 2012, the latter being the expiry date of her contract.
97. The Argument as to whether she had never raised a Claim until the expiry of her contract is untenable. Indeed, in White & Carter (Council) Limited vs. MC Gregor (1962) A. C. 413, the principle of the right of affirmation was laid down as:
"……the right of an innocent Party faced with a repudiation or breach of contract, to elect to continue his own performance of earning his contract price or of obtaining a decree of specific performance against the wrongdoer."
We found it attractive and relevant to apply to the instant case.
98. Furthermore, the finding of the High Court of Uganda in *Tumusiime Fidelis vs. Attorney General (Civil Suit No. 88 of 2003)* is amply instructive in as far as the Court held that:
"…..the law in case of unlawful termination of contract of employment, with no provision for termination prior to expiry of the fixed period is that the employee is entitled to recover as damages the equivalent of remuneration for the balance of the contract period. This is in contrast unlawful termination of a contract that has a stipulation of termination by either party. In such a case the wronged employee is entitled to recover damages the equivalent of remuneration for the period stipulated

in the termination notice."

99. In addressing prayer (C), we therefore find it relevant to borrow the above findings and apply them to the instant case.

100. Pursuant to the Council's decision, Ms. Angella Amudo's employment contract would have covered a five year period; from 1st November, 2008 up to 1st November, 2013. Contrary to the aforesaid decision, her contract was unlawfully terminated on 30th April, 2012 as indicated elsewhere above.

101. Therefore, prayer (C) is allowed to compensate the loss incurred during the period comprised between 1st May, 2012 and 1st November, 2013 to top up a 5 year employment contract she was given by the Appointing Authority, to wit USD 9,024,00.

102. With regard to prayer (D) to which general damages for pain and mental anguish are sought, we equally need to define it as we did for special damages. To that regard, *Black's Law Dictionary* defines General damages as:

"Damages that the Law presumes follow from the type of wrong complained of specific compensatory damages for harm that so frequently results from the tort for which a Party has sued that the harm is reasonably expected and need not be alleged or proved."

103. In other words, general damages are for intangible losses that can be influenced from special one as well as from facts surrounding the case and to that extent, they are not easily measureable.

104. In addition, the High Court of Uganda held in an employment dispute between an employee and a defendant company that:

"On the issue of damages, the Court accepted submission by counsel of the defendant on the general accepted rule that:

'an employee is not entitled to damages for breach of contract of service by the employer as the employer retains the right to terminate his services at any time even for no cause. And in such a situation, an employee is only entitled to recover arrears of completed service and accumulated leave if any."

On this basis the Court ruled that Plaintiff is not entitled to the general damages claimed." [See: *Georges Wanyera vs. Kabira Sugar ltd, 1985 (in the High Court of Uganda at Jinja), HCT-C.S.-0058-1997*].

105. Save for the words "at any time even for no cause", we find the above authority attractive enough and compelling to apply it *mutatis mutandis* to this prayer.

106. With due respect to Counsel for the Claimant, we do not see any basis on which this prayer is premised and Learned Counsel did not adduce any evidence thereof. Furthermore, as long as Counsel for the Claimant did not underscore on which grounds general damages would be evaluated, these damages appear as putative damages in as far as they are claimed but unapproved.

Consequently, prayer (D) is disallowed.

107. Regarding prayer (E), it is obvious that the Claimant has been working for the Community until 30th April, 2012. Again, Counsel for the Claimant did not substantiate the basis of this prayer; he only asserted that aggravated damages are within the discretion of the Court as they are "merely instructive and not obligatory."

108. On our part, we are of the opinion that the conduct of the Respondent's Executive

Officers has been minimized by different short employment contracts accorded to the Claimant.

109. Prayer (E) is therefore, disallowed.

110. On prayer (F), costs shall follow the event in any proceedings as provided under Rule 111(1). Taking into account the merits of the Claim and the determination of issues Nos. 2 and 3, prayer (F) is partially allowed.

Final orders

111. Consequent upon the foregoing, we order as follows:

1) Prayer (A) is granted in the following terms:

The appointment of the Claimant for an initial period of twenty (20) months and subsequent periodical extensions of the appointment up to 30th April 2012, were *ultra vires* the powers of the Secretary General and his deputies and inconsistent with the EAC Staff Rules and Regulations (2006);

2) Prayer (B) is allowed in the following terms:

The Claimant was entitled to a contract of employment for a period of five (5) years in accordance with EAC Staff Rules and Regulations;

3) Prayer (C), is partially allowed in the following terms:

The Claimant is entitled to special damages for loss of earning in the sum of USD9, 024.00;

4) Prayer (D) and prayer (E) are dismissed; and

5) On costs, the Claimant has partially succeeded and shall be awarded half of the taxed costs to be borne by the Respondent.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 1 of 2012

In the matter of a reference under article 30 (1) of the Treaty for the establishment of the East African Community

And

In the matter of the 13th East African Community Summit Directives

**Timothy Alvin Kahoho And the Secretary General of the East African Community**

Johnston Busingye, PJ, M.S. Arach-Amoko, DPJ, John J. Mkwawa, J, Jean B.Butasi, J, Isaac Lenaola,J.
May 17, 2013

*Areas of EAC Co-operation - The EAC Secretariat's role in integration - The role of Summit, the Council of Ministers, the Co-ordination Committee and Sectoral Committees - The Proposed Protocol on Immunities and Privileges – People -centered co-operation- Process of establishing the Political Federation - Summit decisions- Whether the Heads of States' decision contravened the Treaty- Whether the establishment of a Political Federation is an exclusive preserve of the Council.*

*Articles: 6, 7, 23(1),(3),27(1), 30 91),(2), 73 , 123 (6), 131, 138, and 151 of the Treaty - Rules 24 of the East African Court of Justice Rules of Procedure, 2010.*

On 30th November 2011, the 13th Summit of the East African Community issued a Communiqué after its meeting in Bujumbura, Burundi. In it, Summit, *inter alia*, approved the Protocol on Immunities and Privileges and mandated the EAC Secretariat to propose an Action Plan and a Draft Model of the structure of the East African Political Federation.

The Applicant, a citizen of the United Republic of Tanzania and a journalist, filed this Reference averring *inter alia* that: Summit had contravened Articles 73 and 138 of the Treaty by directing the conclusion of the Protocol on Immunities and Privileges because these were not areas of co-operation to which a Protocol could be concluded within the meaning of Article 151 of the Treaty. And that by mandating the Secretariat to propose an Action Plan and Draft Model for the Political Federation, Summit would be circumventing that process as they should have directed the Council to undertake the process. This circumvention would violate Article 123 (6) of the Treaty. When Summit rectified the error during its 14th meeting, by directing Council to consider the process, the Applicant contended that the even then, a violation of Article 123 (6) continued. The Applicant also deponed that the process towards a Political Federation was not the preserve of the Council or Summit but must involve all citizens of the Partner States.

The Respondent contended that Summit's directives did not contravene the Treaty; that the proposed Protocol was meant to create a common platform to enable Partner States coherently implement the Treaty; and that Partner States would negotiate proposals on the Political Federation.

**Held:**

1) The conclusion of any Protocol is at the instance and discretion of the Summit where it deems such an action necessary to achieve the objectives of the Community.
2) Article 131 must be read together with Articles 73 and 138 for a holistic appreciation of the reason why a Protocol on Immunities and Privileges was necessary. The Proposed Protocol was not wholly about staff immunities and privileges as Article 138 could create an area of co-operation to which a Protocol could be concluded under Article 151 of the Treaty. This was not inconsistent with the Treaty.
3) The process of Political Integration and eventual Political Federation did not begin the 13th Summit, but much earlier. Under paragraphs 10 (a) and (b) of the Communiqué, the Secretariat was to; examine working drafts prepared by a Team of Experts, verify and harmonise them towards the functioning of the Customs Union, Common Market and Monetary Union. This mandate was within Article 71 of the Treaty as the Secretariat is the only Organ created by Article 9 of the Treaty to steer the ship of integration by implementing decisions of all the other Organs.
4) The process leading to a Political Federation was not exclusive to the Council and all Organs must work together to attain it and the place of the people is assured in that process.
5) It would be naïve, to presume that on 30th November 1999, when the Treaty was ratified, all areas of co-operation would have been visible and clearly demarcated. Thus, Article 131 was enacted to reduce frequent amendments of the Treaty whenever a new area of co-operation arose. The window to create Protocols in other fields was opened and retained in the said Article 131. The Reference was therefore dismissed.

**Case cited:**

Modern Holdings (E.A) Limited vs Kenya Ports Authority, EACJ Reference No. 1 of 2008

**Judgment**

**Introduction**

1. Timothy Alvin Kahoho, (hereinafter "the Applicant") is a citizen of the United Republic of Tanzania and a journalist by profession. In the Reference premised on Articles 23(1)and (3),27(1) and 30 (2) of the Treaty for the Establishment of the East African Community (hereinafter, "the Treaty"), as well as Rules 24 of the East African Court of Justice Rules of Procedure, 2010, he has sought the following Orders:

(a) A declaration that the Summit had grossly breached the Treaty in particular Articles 6, 7 and 123 (6) of the Treaty , by mandating the Secretariat to *inter alia*;
   (i) Produce a road map for establishing and strengthening the institutions identified by the Team of Experts as critical for the functioning of the Customs Union, Common Market and Monetary Union.

(ii) Formulate an action plan for the purposes of operationalising the other recommendations in the report of the Team of Experts, and
(iii) Propose an action plan on, and a draft model of, the structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting.
(b) The Summit approved the protocol on Immunities and Privileges for the East African Community, its organs and institutions for conclusion in breach of Articles 73 and 138 of the Treaty.
(c) Further, a declaration that the Summit has no mandate under the Treaty to exclude Partner States and the Council from performing functions vested to them by the Treaty and which have an impact in the integration process.
(d) That if ever the Secretariat has already done the mandated functions under items (a) (i) to (iii) and (b) hereto, this Honorable Court be pleased to declare them null and void.
(e) Costs of this Application
(f) Any other relief(s) that this Court deems fit to grant.

**Factual Background**

2. The uncontested facts in this Reference are that on 30th November 2011, the Summit of the East African Community (hereinafter "the Summit") issued a Communiqué after its meeting in Bujumbura, Burundi, and of interest to this matter are paragraphs 6 and 10 where it stated as follows:

"6. The Summit approved the …Protocol on Immunities and Privileges for the East African Community, its organs and Institutions for conclusion" And

"10. The Summit considered and adopted the Report of the Team of Experts on fears, concerns and challenges on the Political Federation. The Summit noted that the Team of Experts had studied and made recommendations for addressing the fears, concerns and challenges. The Summit mandated the Secretariat to:-

I. Produce a Road Map for establishing and strengthening the Institutions identified by the Team of Experts as critical to the functioning of a Customs Union, Common Market and Monetary Union;
II. Formulate an action plan for purposes of operationalising the other recommendations in the Report of the Team of Experts; And
III. Propose an Action Plan on, and a Draft Model of the structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting."

3. It is the language, tenor, and import of the above parts of the Communiqué that triggered the Reference under consideration.

**Case for the Applicant**

4. The Applicant appeared in person and ably argued his case as follows:

That the Summit contravened Articles 73 and 138 of the Treaty when it directed the conclusion of the Protocol on Immunities and Privileges because principally, in his view, those are not areas of co-operation to which a Protocol can be concluded within the meaning of Article 151 of the Treaty. For avoidance of doubt, Article 73 of the Treaty provides as follows:

"1. Persons employed in the service of the Community:
(a) Shall be immune from civil process with respect to omissions or acts performed by them in their official capacity; and
(b) Shall be accorded immunities from immigration restrictions and alien registration.

2. Experts or consultants rendering services to the Community and delegates of the Partner States while performing services to the Community or while in transit in the Partner States to perform the services of the Community shall be accorded such immunities and privileges in the Partner States as the Council may determine."

Article 138 provides as follows;

"1. The Community shall enjoy international legal personality.
2. The Secretary General shall conclude with the Governments of the Partner States in whose territory the headquarters or offices of the Community shall be situated, agreements relating to the privileges and immunities to be recognized and granted in connection with the Community.
3. Each of the Partner States undertakes to accord to the Community and its officers the privileges and immunities accorded to similar international organizations in its territory."

Article 151 provides that;

"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, and institutional mechanisms for co-operation and integration.
2. Each Protocol shall be affirmed by the Summit on the recommendation of the Council.
3. Each Protocol shall be subject to signature and ratifications of the parties hereto.
4. The annexes and Protocols to this Treaty shall form an integral part of this Treaty."
5. It is the Applicant's case that reading all the above provisions together, the issue of immunities and privileges cannot be an area of co-operation as at no point has the Council of Ministers recommended or effected such a decision. That previously, all Protocols signed by the Parties to the Treaty confined themselves to the areas of co-operation as spelt out in Articles 74 – 131 of the Treaty and anything outside those Articles cannot properly be an area of co-operation.

6. The Applicant then made the point that having read the Draft Protocol on Immunities and Privileges, he is more than convinced that the issues of "the staff and workers of the Community" cannot be raised to a level akin to an area of co-operation.

7. On the issue whether the Summit could properly mandate the Secretariat to undertake any of the functions set out in paragraph 10 of the Communiqué, the Applicant argued that such an act was a clear violation of Articles 6, 7 and 123 (6) of the Treaty because the issue of the establishment of a Political Federation of the Partner States can only be initiated by the Summit which then directs the Council to undertake the process as is the language of Article 123 (6). That an attempt at circumventing that process by mandating the Secretariat to propose an Action Plan and Draft Model for the Political Federation would be a violation of the Treaty.

8. In addition to the above, the Applicant, at the hearing of the Reference, stated that at its 14th Summit, the Summit indeed realized its "error" in the 13th Summit and

directed the issue of the process leading to a Political Federation to the Council but even then, it had failed to initiate the same and so a violation of Article 123 (6) continued.

9. In furtherance of the above argument, the Applicant went on to state that the process towards a Political Federation cannot be a preserve of the Council or Summit but must of necessity involve all citizens of the Partner States. In support of this position, he quoted an excerpt from the book, "East African Federation: Blessing or Blight",by Harid Mkali, Ivydale Press, London 2012 ,where the author quoted the late Mwalimu Julius Nyerere, Founding Father of The United Republic of Tanzania as stating in a pamphlet published on 16th October 1968 and titled "Freedom and Development": "No person has the right to say, 'I am the people'. No Tanzanian has the right to say 'I know what is good for Tanzania and the others must do it.' …so to take Tanzania into Federation without a Referendum is to say that the President and the Cabinet know 'what is good for Tanzania and the others must do it'. This federation is potentially highly toxic for Tanzania, a fact that needs to be squarely faced by all concerned and that is why the consent of all Tanzanians is crucial – lest we blame one another tomorrow."
10. The point made by the Applicant is that to fast-track the Political Federation without finalizing the Customs Union, Common Market and Monetary Union and without consulting citizens of the Partner States would be an act of unprecedented violation of the Treaty by the Summit.
11. The Applicant raised two other issues in submissions which are pertinent; the first is the argument that the issue of Immunities and Privileges can only be settled by conclusion of Agreements by the Secretary General of the Community in that respect with Partner States and not by creation of a Protocol.
12. Secondly, that as a citizen of a Partner State, he was deeply troubled by the actions of the Summit aforesaid and was entitled to general and special Damages for the pain that he suffered, including developing high blood pressure.

**Case for the Respondent**

13. The Respondent's answer to all the issues raised above was that the Reference was completely misguided and that the Applicant had failed to understand the intentions of the framers of the Treaty upon a clear reading of Articles 73, 138 and 151 relating to the Draft Protocol on Immunities for the following reasons;
    i) That although a number of Headquarters' Agreements have been concluded by the Respondent pursuant to Article 138 (2) of the Treaty, inconsistencies were noted from one Partner State to another and after a series of meetings, the Sectoral Council on Foreign Policy Coordination proposed to the Council of Ministers that a Protocol was necessary to provide standard guidelines that would uniformly cater for the employees of the Community, its Organs and Institutions , particularly on matters of immunities and privileges to be granted to them in Partner States.
    ii) That the negotiation and conclusion of the proposed Protocol on Immunities and Privileges for the Community, its Organs and Institutions was meant to create a common platform to enable Partner States coherently implement Articles 73 and

138 as read with Article 151 of the Treaty.

iii) That the argument that no areas of co-operation can be raised under Article 73 and 138 aforesaid is unsustainable because the issue was raised within the meeting of the Attorneys-General of the Partner States held on 2nd November 2011 and it was agreed that the need to establish a common platform to guide the issues of status, immunities and privileges signed by the Secretary General with the Governments of Partner States was important and sufficient to warrant a Protocol being concluded. Further, that the proposed Protocol would fall within Articles 5(3), (h), 131 and 151 of the Treaty as enabling provisions for Partner States to advance their integration and that Article 131 was a general co-operation clause which could be invoked from time to time when new areas of co-operation emerged.

14. On the question of Political Federation and the processes leading to it, the case for the Respondent is that the mandate given to the Secretariat to propose an action plan for consideration by Summit was not a contravention of Articles 6, 7 and 123 (6) of the Treaty but were in fact consistent with the same.
15. That the initiation of the said process was a matter undertaken by the Summit which then directed the Council to operationalise it in line with the Treaty. Council in compliance thereof, appointed a Team of Experts towards that end at its 20th Meeting held on 19th – 26th March 2010 and the directive at the 13th Summit was only a follow up to a process that had long been in place and the 13th Summit was not the meeting at which the same was initiated.
16. Further, that the functions of the Secretariat are set out in Article 71 of the Treaty and that the wording of that Article is wide enough to cover the implementation of any directive given to it by the Summit, including the one issued in the Communiqué under attack.
17. It is also the Respondent's contention that Article 123(6) of the Treaty is complimentary to, and not in conflict with, Article 71, and that the latter does not oust the former. That taken in that context, it "would be strange to expect the Council to execute its demanding assignments relating to integration other than through the Secretariat which is seized with both the technical and other relevant capabilities that facilitate the Council." It is also contended in that regard that "in exercising its mandate under the Treaty, [Council] relies entirely on the Secretariat to do so and as such the fears and prayers of the Applicant are alarmist, misconceived and generally designed to abuse Court process."
18. Lastly on this issue, the Respondent has urged the point that all Partner States were aware that at an appropriate time after the Secretariat had completed its assignment, the Partner States would negotiate the proposed institutions relevant for Political Federation or any other matters, and neither the Summit nor the Secretariat made any suggestion that such negotiations are not necessary. That in furtherance of that position, the Summit at its 14th Summit, contrary to the Applicant's assertion, directed the Council to report progress to the 15th Summit on all matters forming the subject of the Reference herein.
19. That therefore, the Reference, being devoid of merit, should be dismissed with costs

**The Scheduling Conference**

20. On 15th January 2013, a Scheduling Conference was held and the Parties agreed that the following issues would be the ones to be determined by the Court:
    i) Whether the 13th Summit decisions as set out in paragraph 6 of its Communiqué issued on 30th November 2011 in the Republic of Burundi approving the Protocol on Immunities and Privileges contravened Articles 73, 138 and 151 of the Treaty;
    ii) Whether the 13th Summit of the Heads of States' decision to mandate the Secretariat to undertake the functions stated in paragraph 10 of its Communiqué issued on the 30th November 2011 at Bujumbura in the Republic of Burundi was in contravention of Articles 6, 7 and 123 (6) of the Treaty.
    iii) Whether the process towards the establishment of a Political Federation of the Partner States is an exclusive preserve of the Council to which the Secretariat cannot contribute.
    iv) Whether the conclusion of Protocols is only permissible where the Treaty specifically provides for areas of co-operation.
    v) Whether the Applicant is entitled to the prayers sought?

**Determination**

21. We have read the following documents on record:
    i) The Reference titled "Application dated 12th January 2012"
    ii) The Response to Reference together with the Affidavit in support both dated 28th February 2012.
    iii) The Reply to the Response dated 20th March 2012
    iv) The Response to the Reply to the Response dated 8th May 2012.
    v) Applicant's written submission filed on 13th February 2013.
    vi) Respondent's written submissions filed on 14th March 2013.
    vii) Applicant's rejoinder to the Respondent's written submissions filed on 15th April 2013.
    viii)
22. We have also taken into account the annextures to the documents placed before us including the Communiqué under attack, the Communiqué issued after the 14th Summit, the Report of the 11th Meeting of the Sectoral Council on Legal and Judicial Affairs, the Report of the 20th Meeting of the Council of Ministers, the draft Protocol on Immunities and Privileges of the East African Community, its Organs and Institutions, the Headquarters Agreement between the Government of Kenya and the Community for the Lake Victoria Basin Commission and the Headquarters Agreement between the Government of the United Republic of Tanzania and the Secretariat for the Tripartite Commission for co-operation between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda.
23. In *Modern Holdings (E.A) Limited vs Kenya Ports Authority, EACJ Reference No. 1 of 2008*, this Court stated *inter-alia* that "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' (VCLT)"
    The Court then proceeded to invoke Article 31(1) of the Vienna Convention on the

Law of Treaties which sets out the general rule of interpretation as including the following factors;

"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."

The above principle is what we shall use as a guide in determining the four principal issues placed before us for resolution.

25. All the above documents together with the Treaty will also form the basis for our opinion which we now render as follows:-

Issue No. 1 – whether the 13th Summit decision as set in paragraph 6 of its Communiqué issued on 13th November 2011, in the Republic of Burundi, approving the Protocol on Immunities and Privileges contravened Articles 73, 138 and 151.

26. We have elsewhere above reproduced Articles 73, 138 and 151. To answer the Applicant's complaint with regard to paragraph 6 of the Communiqué, one must necessarily begin by defining a "Protocol". Article 1 of the Treaty defines it in the same language as *Black's Law Dictionary, Ninth Edition*, where it is defined as "a treaty amending and supplementing another treaty". Wikipedia goes further to explain that it is a "rule on how an activity should be performed especially in the area of diplomacy."

27. In the context of the issue at hand, the Respondent has explained that for Articles 73 and 138 to be "coherently implemented", a Protocol was required under Article 151. Article 151 (1) specifically provides that Protocols shall be concluded as may be necessary in each area of co-operation and the Protocol shall spell out the objectives of, and institutional mechanisms for co-operation and integration.

28. Looking at the definition of a Protocol as above together with Article 151 of the Treaty, it is obvious that the conclusion of any Protocol is at the instance and discretion of the Summit where it deems such an action necessary to achieve the objectives of the Community. That is why Article 151(4) specifically provides that once concluded, a Protocol becomes an integral part of the Treaty. Integral means that it becomes a necessary part of the Treaty and supplements it in the operationalisation of the area of co-operation that it is meant to address.

29. We heard the Applicant to be arguing that privileges and immunities are not areas of co-operation and that under Article 138, only Agreements with Partner States can address those issues. With respect, we disagree with him. We say so because he has taken a very narrow view of what the Treaty sets out as "areas of co-operation." He has also completely failed to note that Chapter Twenty Seven of the Treaty is headed, "Co-operation in other fields" and Article 131, the only Article in that Chapter, is titled, "Other Fields". Pausing there for a moment, it is obvious to us that the framers of the Treaty were aware that it would be wrong, nay naïve, to presume that on 30th November 1999, when the Treaty was ratified, all areas of co-operation would be visible and clearly demarcated. Article 131 was then enacted in answer to that difficulty and it is in the following words;

"1. Subject to the provisions of this Treaty, the Partner States undertake to consult with one another through appropriate institutions of the Community for the purpose of harmonizing their respective policies in such other fields as they may from time

to time, consider necessary or desirable for the efficient and harmonious functioning and development of the Community and the implementation of the provisions of the Treaty.

2. For purposes of paragraph 1 of this Article, the Partner States may take in common such other steps calculated to further the objective of the Community and implementation of the provisions of the Treaty."

30. To our minds, Article 131 must be read together with Articles 73 and 138 for a holistic appreciation of the reason why a Protocol on Immunities and Privileges is necessary. The reasons given by the Respondent include the need to harmonise and create a common platform to guide the "issue of status immunities and privileges in Host Agreements signed by the Secretary General with Governments of the Partner States relating to EAC Organs and Institutions." These reasons are not alien to the need for a harmonious, functioning and developing Community under Article 131 aforesaid.

31. We have had a look at the Proposed Protocol on Immunities and Privileges of the East African Community, Organs and Institutions as well as the Headquarters Agreements elsewhere mentioned above. The Proposed Protocol has the following structure:
    a) Definitions
    b) Objectives
    c) Scope of Arrangement

    In the preamble, it is partly stated as follows;
    "that it is desirable to conclude a Protocol by which the Partner States undertake to accord the Community, its organs, institutions and persons employed in different capacities in its service with such immunities and privileges as are accorded to similar international organizations in the territories of the Partner States."

32. The language, structure and import of the Proposed Protocol, in our view, is in line with the harmonization, functioning, development and furtherance of the objectives of the Community and the implementation of the provisions of the Treaty which is what one can discern from reading Articles 73, 131 and 138 in good faith and we find no inconsistencies therein.

33. Before we conclude the determination of Issue No. 1, we must point out that the execution of any Agreement under Article 138 (2) is not an ouster of the provision for conclusion of a Protocol under Article 151 where the situation so demands. The Treaty provisions must be read as complimentary to each other and none (as is the Applicant's line of argument) should be seen as independent and in conflict with another. To argue otherwise, would lead to a legal absurdity and a negation of the principle that the Treaty must be interpreted as a whole and not selectively to suit a set purpose.

34. One other issue we must clarify is the intent and meaning of co-operation in the context of the Treaty. We heard the Applicant to argue that the issue of immunities and privileges cannot be one amounting to co-operation because it is personal to the employees of the Community. "Co-operation" is defined in *Black's Law Dictionary (supra)* as "the voluntary coordination action of two or more countries occurring under a legal regime and serving a specific objective."

35. Taken in the above context, the legal regime is the Treaty and the specific objective of

the Treaty is the eventual full integration of the Partner States in both political and economic terms. In furtherance of that objective, The Proposed Protocol in Article 2 states as follows;

"The objectives of this Protocol are to provide a basis upon which –

a) property and assets of the Community shall be protected from every form of legal process;
b) funds of the Community shall be protected from the Partner States' financial controls, regulations or moratorium of any kind.;
c) immunities and privileges shall be accorded to persons in the service of the Community".

36. Article 138 (1) provides that "the Community shall enjoy international legal personality" and therefore Article 2 (a) and (b) of the Proposed Protocol address that provision while Article 2 (c) above is in furtherance of Article 138 (2) and (3) which the Applicant latched onto in his submissions.
37. It is obvious without saying more, that the Proposed Protocol is not wholly about staff immunities and privileges and that Article 138 can clearly create an area of co-operation to which a Protocol can properly be concluded under Article 151 of the Treaty. Even if it were, we do not find that such a factor, alone, would constitute an inconsistency with the Treaty.
38. In conclusion on this issue, we must state that Article 131 was enacted to reduce frequent amendments of the Treaty whenever a new area of co-operation arises and which cannot otherwise be managed outside existing provisions of the Treaty. The issues arising from Article 138 aforesaid fit that reasoning perfectly.
39. For the above reasons, our answer to Issue No. 1 is in the negative.

Issue No. 2 – whether the 13th Summit of Heads of State Decision to mandate the Secretariat to undertake the functions stated in paragraph 10 of its Communiqué, that was issued on 13th November 2011 in Bujumbura was in contravention of Articles 6, 7, and 123 (6) of the Treaty.

40. Elsewhere above we have set out the contents of paragraph 10 of the Communiqué and one of the issues that the Secretariat was mandated to do was to propose an action plan on, and a draft model of the structure of the East African Federation for consideration by the Summit at its 14th Ordinary Meeting. That matter is also partly to be covered in the determination of Issue No. 3 later in this judgment.
41. For purposes of Issue No. 2, we shall limit ourselves to the issue of the interpretation to be given to Article 123 (6) and the role of the Secretariat in the Community. In that regard, it is important to note that Article 123 (6) provides as follows;

"The Summit shall initiate the process towards the establishment of a Political Federation of the Partner States by directing the Council to undertake the process".

42. The Applicant's argument in this regard is that by mandating the Secretariat to "propose an action plan" and a "draft model of the structure of the East African Political Federation", the Summit acted in breach of the operational principles of the Community (Article 7) and the "General undertaking as to implementation" of the Treaty (Article 8) as well as specifically Article 123 (6) aforesaid.
43. We agree with the Respondent that the Applicant's argument on this issue is misguided. We say so, with respect, because as shall be seen later, initiation of the

process of Political Integration and eventual Political Federation was not made at the 13th Summit, but much earlier. That, therefore, the mandate given to the Secretariat was in furtherance of a process that had been in place long before the Bujumbura Communiqué which then leads to the question: what is the relationship of the Summit vis-à-vis the Secretariat? Article 71 of the Treaty sets out the functions of the Secretariat and of relevance to the issue at hand and as properly argued by the Respondent, are the following:

i) Article 71 (1) (b) –the initiation of studies and research related to and the implementation of programmes for the most appropriate and expeditious and efficient ways of achieving the objectives include "widening and deepening co-operation among Partner States" and the establishment in accordance with the provisions of the Treaty, a Customs Union, a Common Market, and subsequently a Monetary Union and a Political Federation.

44. All the above objectives are also set out at paragraph 10 of the Communiqué and the Secretariat was neither initiating them nor was it undertaking the actual processes as alleged by the Applicant. It was merely mandated to do technical work which under the Treaty provisions quoted above, is entirely in its province.

ii) Article 71 (1) (d) – the undertaking either on its own initiative or otherwise investigations, collection of information or verification of matters relating to any matter affecting the Community that appears to it merit examination.

45. A clear reading of paragraphs 10 (a) and (b) of the Communiqué would show that the Secretariat was actually examining and working from drafts prepared by a Team of Experts and verifying and harmonizing them towards the functioning of the Customs Union, Common Market and Monetary Union. In our humble view, that mandate does not fall outside Article 71 of the Treaty.

iii) Article 71 (1) (l) – the responsibility for the implementation of the decisions of the Summit and the Council.

46. This responsibility is extremely wide and covers all directives and mandate issued by and conferred by the Summit on the Secretariat and this is the critical link between the Summit and the Secretariat. The latter, functionally, is subservient to the former and this is the context in which the mandate contained in the Communiqué must be looked at. In addition to this, Article 11 which relates to the functions of the Summit provides at Article 11(1) that:

"The Summit shall give general directions and impetus as to the development and achievement of the objectives of the Community."

The directions given to the Secretariat contained in paragraph 10 aforesaid are well within the mandate of the Summit and conversely this is also within the Secretariat's mandate to receive and act on those directions and we see no breach of the Treaty by either of the two Organs of the Community.

47. We also agree with the Respondent that the directions given were not an end in themselves; the Secretariat was also directed to present all the draft proposals for consideration by the Summit at its 14th Ordinary Meeting .At that Meeting, the drafts proposals would only become useful if the Summit adopted them in which event they would become its documents and not of any other Organ.

48. While addressing this issue, it behoves us to address in a few words the critical role

that the Secretariat plays in the affairs of the Community, generally. In the book, "*The Drive Towards Political Integration in East Africa," Ed. Isabelle Wafubwa and Joseph Clifford Birungi at page 173*, one Prof. Sam Turyamuhika writes as follows:

"The current EAC Secretariat has been typified as powerless, meetings and workshop organizer, minute taker etc."

49. We take a different view of that harsh and unfair judgment. The EAC Secretariat is the fulcrum on which the wheels of integration rotate. The Summit, the Council of Ministers, the Co-ordination Committee and Sectoral Committees are all part-time and meet only as often as their functions require. Yet, the Secretariat slogs, day in, day out, to ensure that the ship of integration remains afloat. The Community, in our view,is like a giant ship owned by shareholders(the people of East Africa);the Summit is like a Board of Directors and the Council, is like the Management. The Captain is the Secretary-General and the crews are the staff in the Community. To call the Captain and crew, useless, and denigrate their role in keeping any ship on the high seas on course, is to say that the shareholders or the Board of Directors can single-handedly and without any input from those that physically man the ship, sail that ship from a distance. The Summit represents the owners of the ship, and its duty is to decide where the ship goes and should always act in the best interests of the shareholders. The Summit thus meets periodically to assess progress and regularly inform the shareholders of the profits (benefits) from the operations of the ship. The Council, Co-ordination and Sectoral Committees are the Summit's agents in overseeing progress aforesaid. Without the Captain and crew, the ship can barely survive the storms and other perils that are prevalent in high seas including attacks by pirates. We digressed to make the point that, our reading and understanding of Articles 11,14,18,21 and 71 of the Treaty, which create the functions of the Organs of the Community, is that the Secretariat is the only Organ created by Article 9 of the Treaty to steer the ship of integration by implementing decisions of all the other Organs and its crucial role thereby ought to be recognized and supported.
50. In any event on Issue No. 2, our answer is in the negative.

Issue No. 3 – whether the process towards the establishment of a Political Federation of the Partner States is an exclusive preserve of the Council to which the Secretariat cannot contribute.

51. We have touched on this issue while addressing Issue No. 2 and we think that the present issue is a corollary of the other. However, it is obvious that whereas Issue No. 2 also dealt with directions to the Secretariat regarding the Customs Union, Common Market and Monetary Union, this one is specific to paragraph 10 (c) of the Communiqué which is about Political Integration.
52. Elsewhere above, we stated that the initiation of a process towards a Political Federation did not begin with the Communiqué issued at Bujumbura. In a book titled "The State of East Africa Report, 2006" published by Society for International Development, at page 7, it is written as follows:

"At the August 28th, 2004 EAC Summit held in Nairobi, Kenya, the Presidents of Kenya, Uganda and Tanzania resolved to work towards 'the political federation of East Africa'. To this end, a high level Committee on Fast-Tracking East Africa Federation was established. The Committee reported back to the Heads of State at a

Summit held on November 26th, 2004 in Arusha, Tanzania, where it was resolved to set up a political federation by '2010'. In their Joint Communiqué following the Third Extra-Ordinary Summit of the East African Community held on May 30th, 2005, in Dar es Salaam, Tanzania, the Heads of State 'reaffirmed their commitment to East African Federation which is enshrined in the Treaty Establishing the East African Community'. They 'further observed that a strong Federation is only possible if it is owned by the people of East Africa themselves through the effective and informed participation from the very beginning of the process through to the end'."

53. This background is important in answering the question whether the Summit, pursuant to Article 123 (6) of the Treaty actually initiated the process towards a Political Federation at the Bujumbura Summit. In fact in its Report dated 26th November 2004 presented to the Summit, the Committee on Fast Tracking East African Federation, in its transmittal letter to the Heads of State, acknowledged that the Summit in fact initiated the process by its Communiqué of the 28th August 2004 and not later. These facts cannot be contested because they have been well documented for posterity.
54. Turning back to the specific question raised above, while determining Issue No. 2, we were categorical that the Secretariat is not a stranger to the implementation of the process towards a Political Federation and we have said why. We have already analysed its relationship with the Summit and now it behoves us to determine its relationship with the Council.

    Article 14 of the Treaty defines the functions of the Council to include;

    i)to make policy decisions – Article 14 (1);

    ii) to promote, monitor, and keep under constant review the implementation of programmes of the Community and ensure the proper functioning and development of the Community – Article 14 (2);

    iii) Subject to the Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and the Assembly- (Article 14(3).
55. One of the organs of the Community under Article 9 (g) of the Treaty is the Secretariat and therefore it would be expected that when executing its mandate under Article 123 (6) of the Treaty, to undertake the process leading to a Political Federation, the Council is well within its powers to give direction to the Secretariat in any matter it deems fit including that process. Elsewhere above, we made the point and now we reiterate it, that of all the Organs of the EAC, it is only the Secretariat which is clothed with the mandate and technical expertise to implement the integration agenda as may be directed by Council or Summit.
56. The Applicant also made the point that the Summit, by implication, admitted its 'error' in mandating the Secretariat, as opposed to the Council, in implementing the process leading to a Political Federation. To his mind, the fact that the 14th Summit used the following words, was telling in that regard;

    "The Summit Noted the Progress made on the Road Map for establishing the Political Federation and model Structure for the Federation and directed Partner States to consult further….

    And directed the Council of Ministers to Report progress to the 15th Summit of the EAC Council of Ministers."

57. We have elsewhere above stated that the Summit can direct the Secretariat as well as the Council in matters relating to the implementation of the Treaty. Whether in one instance it directs one and later the other, is not in any way a breach of the Treaty. These Organs must all work in tandem towards the attainment of the objectives of the Community and there is no "error" that was rectified when the Summit acted as it did in the 14th Summit.
58. Another issue which we must address is that of the participation of the citizens of the Partner States in the integration process. Although the issue was vaguely pleaded it was more firmly articulated in submissions by the Applicant and his point was that like Mwalimu Nyerere warned in 1968, the process of integration must be people-centred or it will lead to regrettable consequences. The issue is not difficult and all we can do in answer to the Applicant, is to refer to Article 7(1) (a) which provides that one of the Operational Principles of the Community is that of a 'People-centered and market driven co-operation'. If the People of East Africa are at the centre of the entire process, then it follows that their input is not just necessary but imperative.
59. This Court takes judicial notice of the fact that meetings with citizens were held in all Partner States prior to the initiation of the process towards a Political Federation and there is no evidence placed before us to show that such consultations will not continue in the future.
60. Without belabouring the point, the process leading to a Political Federation is not exclusive to the Council and all Organs must work together to attain it and the place of the people is assured in that process.

Issue No. 3 must be answered in the negative for the above reasons.

Issue No. 4 – Whether the completion of Protocols is always only permissible where the Treaty specifically provides for areas of co-operation

62. We are of the view that our determination of Issue No. 1 also determined Issue No. 4. We merely wish to reiterate, that once Article 131 is properly read and invoked, then it is fallacious to state that only areas of co-operation detailed in Articles 74 – 130 can properly attract the conclusion of Protocols. We have conclusively found that Article 131 envisages areas of co-operation which may not have existed in 1999 and so the window to create Protocols "in other fields" was opened and retained in the said Article 131. We say no more.

Issue No. 5 – Whether the Applicant is entitled to the Prayers sought

63. Reading the Prayers in the Reference which are reproduced at the beginning of this judgment, prayers (a), (b), (c ), and (d) have been found wanting and regarding prayer (f), the Applicant in his submissions stated as follows:

"Lastly, but not least is item (f) hereto, regards grounds 13 and 14 of the Affidavit. (sic). I earnestly request this Honourable Court to please consider awarding me US $60,000 as specific damages"(sic).

64. Neither in the Reference nor in submissions, written and oral, was the sum of US $60,000 justified or proved. The oral claim that because of the Communiqué, the Applicant suffered high blood pressure and was therefore entitled to compensation, was in our view not sufficient evidence that the Applicant was lawfully entitled to the said sum. In any event, once we have found all his claims untenable, no award in damages is justifiable.

65. On prayer (e), we think that the Applicant, impressive as his submissions were, was only a decent citizen who was pursuing a dream and although we have not found in his favour on any issue that he raised in the Reference, we do not consider it appropriate to award costs against him. He has always claimed to be an indigent and in fact this Court had to sit in Dar- es -Salaam, Tanzania, to hear the Reference close to his residence and in appreciation of the principle that this Court must be easily accessible to the people of East Africa. We do not see any reason to punish him with costs and so we shall order that each party should bears its own costs.
67. The final Orders to be made are therefore that, the Reference is hereby dismissed but 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.2 of 2012

**Democratic Party And The Secretary General, East African Community The Attorney General of the Republic of Uganda, The Attorney General of the Republic of Kenya, The Attorney General of the Republic of Rwanda, The Attorney General of the Republic of Burundi**

Jean-Bosco Butasi, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, J, Isaac Lenaola, J, Faustin Ntezilyayo
November 29 , 2013

*Cause of action – Partner State's discretion - The concept of Justiciability- Triable issues- Whether the delay by the Respondents to deposit their declarations on Protocol on the African Charter infringed the Treaty- Whether the EAC Secrary General had a duty to compel or supervise Prtner States.*

*Articles:5, 6, 7(2), 8(1)(c), 126 and 130 of the Treaty – Articles: 5(3) and 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.*

The Applicant a political organization registered in the Republic of Uganda averred that the Republics of Uganda, Kenya, Rwanda and Burundi who were all signatories to the African Charter and the Protocol had failed, refused or delayed despoting their respective declarations to accept the competence of the African Court on Human and Peoples rights as required by Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples Rights. This meant that non-governmental organisations and individuals in East Africa who were aggrieved could not access the Court because of restrictions imposed by Articles 5(3) and 34(6) of the Protocol on the Establishment of the African Court.

The Applicant had requested to the Respondents, including the 1st Respondent, to remedy the above situation but no action was taken thus leading up to this reference. The Applicant sued the 2nd, 3rd, 4th and 5th Respondents in their capacities as principal legal advisers to their respective governments and vicariously liable for their actions and the 1st Respondent in his capacity as the officer mandated by the Treaty for the Establishment of the East African Community to supervise the implementation of the said Treaty. The Applicant averred that the 2nd, 3rd, 4th and 5th Respondents refusal to accept the jurisdiction of the African Court infringed the fundamental principles of "good governance, including adherence to the principles of democracy, rule of law, social justice and the maintenance of universally accepted standards of human rights" which were enshrined in the Treaty. However, the 4th Respondent deposited the declarations after being served with the Reference.

In their response, the Respondents contended that there was no time frame for them to deposit their declarations under Article 34(6) of the Protocol and the issue of delay or inaction did not arise. Further, the 1st Respondent stated that there was no Treaty provision that obliged the 1st Respondent to compel a State Party to make a declaration in terms of Article 34(6) of the Protocol and thus the Reference was misguided.

**Held:**

1) The issues before the Court were both triable and justiciable as the Court can interrogate the Respondents' alleged actions or inactions within its Treaty mandate under Article 30.
2) The 1st Respondent had no specific role under the African Charter and Protocol and to expect him to do more than he did would be unreasonable. Neither the facts nor the eventual remedy to be granted or denied would create a cause of action against the 1st Respondent.
3) The Court could not 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. If there was a violation of the African Charter and Protocol, the Court was not the forum to challenge such violations.
4) Neither the 1st Respondent nor the Court could compel the 2nd, 3rd, and 5th Respondents to deposit the declarations under Article 34(6) of the Protocol.
5) The facts did not point to a violation where the sole discretion was left to the Partner State. And even if the Court could invoke Articles 6(d), 7(2), 126 and 130 of the Treaty, the facts did not point to a violation.

**Cases cited:**

Auto Garage v. Motokov No.3 (1971) EA 514
Michelo Yogogambaye v. Senegal, ACHPR, File No.001/2008
Modern Holdings Ltd (EA) Ltd vs. Kenya Ports Authority, EACJ Reference No.1 of 2008
Mtikila & Others v Attorney General of the United Republic of Tanzania, EACJ, Reference No.2 of 2007
Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd 1989 [KLR) 1
P. Rugumba v Attorney General of Rwanda, EACJ Reference No.8 of 201

**Editorial Note:** The finding by the Trial Court that the Court had no jurisdiction to ensure adherence to the provisions of the African Charter and its Protocol was set aside in Appeal No.1 of 2014.

## Judgment

**Introduction**

1. The Applicant herein is the Democratic Party, a political organization in the Republic of Uganda registered under the Political Parties' and Organizations Act, 2005. It has sued the 2nd, 3rd, 4th and 5th Respondents in their capacities as principal legal

advisers to their respective governments and vicariously liable for their actions while the 1st Respondent has been sued in his capacity as the officer mandated by the Treaty for the Establishment of the East African Community ("the Treaty") to supervise the implementation of the said Treaty.

2. The Reference principally challenges the alleged failure by the 2nd, 3rd, 4th and 5th Respondents to make individual country declarations in acceptance of the competence of the African Court on Human and People's Rights in line with Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (hereinafter referred to as "the Protocol" and "the African Court", respectively). It is urged that the alleged failure to do so is an infringement of Articles 5, 6, 7(2), 8(1)(c), 126 and 130 of the Treaty and Articles 1, 2, 7, 13, 26, 62, 65 and 66 of the African Charter on Human and People's Rights ("the African Charter") and the Protocol aforesaid. It is further urged that the said actions were a violation of the Vienna Convention on the Law of Treaties, 1969.
3. In that regard, the following declaratory orders are sought by the Applicant:
   "a) That the acts of the 2nd, 3rd, 4th and 5th Respondents of failure or refusal and/or delay to make respective declarations 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 on the Establishment of an African Court on Human and Peoples Rights and all other International Human Rights Conventions is an infringement of Articles 5, 6, 7(c), 126 and 130 of the Treaty for the Establishment of the East African Community and Articles 1, 2, 7, 13, 26, 62 and 66 of the African Charter on Human and People's Rights the Vienna Convention on the Law of Treaties, 1969;
   b) The demand made by the Applicant to the 1st, 2nd, 3rd, 4th and 5th Respondents to make their declarations to accept the jurisdiction of the African Court, despite the fact that they ratified the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples Rights and all International Human rights Conventions, has not been considered and the Applicant as an individual legal personality and other individuals in East Africa are aggrieved as they cannot have access to the Court because of the restrictions imposed by Articles 5(3) and 34(6) of the Protocol on the Establishment of the African Court requiring that the Court shall not receive any petition involving any State Party to the African Union which has not made any declaration under Articles 5(3) and 34(6) of the Protocol.
   c)That failure/refusal and inaction of the 2nd, 3rd, 4th and 5th Respondents to deposit the said declarations is in itself an infringement of the fundamental principles 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 accepted standards of human rights which are enshrined in those Articles of the Treaty of the Community in particular regard to peaceful settlement of disputes(sic).
   d) The failure/refusal and inaction of the 2nd, 3rd, 4th and 5th Respondents to deposit the said declarations is in itself an infringement of Articles 5, 6, 7(2), 8(1)(c), 126 and 130 of Treaty for the Establishment of the East African Community

which is founded on the African Charter on Human and People's Rights and all other International Human Rights Conventions, International Law as well as their various National Constitutions.

e) That in the East African Community the following Partner States having signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights as follows:

| | Country | Date of Signature | Date of Ratification | Date of Deposit |
|---|---|---|---|---|
| 1. | Burundi | 09/06/1998 | 20/04/2003 | 12/05/2003 |
| 2. | Kenya | 07/07/2003 | 04/02/2004 | 18/02/2005 |
| 3. | Rwanda | 09/06/1998 | 05/05/2003 | 06/05/2003 |
| 4. | Tanzania | 09/06/1998 | 07/02/2006 | 10/02/2006 |
| 5. | Uganda | 01/02/2001 | 16/02/2001 | 06/06/2001 |

Are bound by the African Charter on Human and People's Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and all other International Human Rights Conventions, International law as well as their various National Constitutions and there is no justification for them to withhold the deposit of declarations to enable individuals and NGOs have access to the African Court and under Article 8(1)(c), 126 and 130 of the Treaty for The Establishment of the East African Community they are obliged to harmonize their laws to universally accepted standards of Human rights and abstain from any measures that are likely to jeopardize the achievement and objectives of the Treaty and the African Charter on Human and Peoples' Rights and all other International Human Rights Conventions, International Law as well as their various National Constitutions and laws.

f) The rule of law in East Africa requires that public affairs are conducted in accordance with the Treaty for Establishment of the East African Community Treaty and the acts of the 2nd, 3rd, 4th and 5th Respondents are a blatant violation of the rule of law and are unlawful and an infringement of the Treaty and the East African Community Integration.

g) The United Republic of Tanzania, another Partner State of the East African Community having signed, ratified, acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights went ahead and entered(sic) a declaration in conformity with Article 34(6) along with other African State parties as follows:
   i) Burkina Faso: The court shall be competent to receive cases from individuals and NGOs with observer status within the African Commission on Human and Peoples' Rights. (signed on 14/07/1998 and deposited on 28/07/1998);
   ii) Malawi: Accepts the competence of the Court to receive cases under Article 5(3) of the Protocol. (signed: 09/09/2008 and deposited: 09/10/2008);
   iii) Mali: Accepts competence of the Court to receive cases in accordance with

Article 5(3) of the Protocol. (signed: 05/02/2010 and deposited: 19/02/2010);

iv) Tanzania: The Court may entitle Non-governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it in accordance with Article 34(6) of the Protocol. However, without prejudice to Article 5(3) of the aforesaid Protocol, such entitlement is only to be granted to such NGOs and individuals once all domestic legal remedies have been exhausted and in adherence to the Constitution of the United Republic of Tanzania. (signed: 09/03/2010 and deposited: 29/03/2010);

The 2nd, 3rd, 4th and 5th Respondents as other Partner States of the East African Community have no reason whatsoever to withhold their deposits of declaration.

h) The 1st Respondent being the Chief Executive Officer of the East African Community is mandated to play supervisory roles over all the Partner States of the East African community to ensure that they comply with the Treaty.

i) The Secretary General of the East African Community has failed to supervise the 2nd, 3rd, 4th and 5th Respondents to ensure that they deposit their respective declarations in order to make them conform to the Treaty for the Establishment of the East African Community, the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and all other International Human Rights Conventions, International Law as well as their various National Constitutions and Laws.

j) The 2nd, 3rd 4th and 5th Respondents as Attorney Generals of Uganda, Kenya, Rwanda and Burundi are vicariously liable for the actions of their respective Governments.

k)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 for the Establishment of the East African Community and Rules 1(2) and 21 of the East African Court of Justice Rules of Procedure as there are serious questions for determination by Court the legality of any Act, regulation, directive, decision or action of a Partner State or Institution of the Community on grounds that such an Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of the Treaty(sic).

l) Costs of this Reference be provided for."

**Factual Background**

4. The facts of the Reference are undisputed and they are as follows: The Republics of Uganda, Kenya, Rwanda and Burundi are all signatories to the African Charter and the Protocol. Article 34(6) of the Protocol provides as follows:

"At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration".

5. Further, Article 5 of the said Protocol provides as follows:

"1. The following are entitled to submit cases to Court:

a) The Commission,
b) The State Party which has lodged a complaint to the Commission,
c) The State Party against which the complaints has been lodged to the Commission,
d) The State Party whose citizen is a victim of human rights violation
e) African Inter-governmental Organizations.

2. When a State Party has an interest in a case, it needs to submit a request to the Court to be permitted to join.
3. The Court may entitle relevant Non Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol."
6. During the pendency of the proceedings, Rwanda complied with the provisions of Article 34(6) aforesaid and in a declaration dated 22nd January, 2013 under the said Article, it declared that:
"The African Court on Human and Peoples' Rights may receive petitions involving the Republic of Rwanda, filed by Non-Governmental Organizations (NGOs) with observer status before the African Commission on Human and Peoples Rights and individuals, subject to the reservation that all local remedies will have been exhausted before the competent organs and jurisdictions of the Republic of Rwanda".
7. When the above declaration was brought to the attention of the Applicant, the Reference as against Rwanda was withdrawn on 22nd August, 2013 and the only issue to address in that regard at the end of this judgment is costs, for or against the Republic of Rwanda.
8. With regard to the 2nd, 3rd and 5th Respondents, it is not contested that they have not filed any declaration pursuant to Article 34(6) aforesaid and that is the gist of the Applicant's Reference.

**Case of the Applicant**

9. The Applicant's case is contained in an Affidavit sworn on 19th January, 2012 by one Emmanuel Nsubuga, Secretary General of the Applicant political party and in submissions filed on 18th April, 2013 as well as a composite response to the Respondent's submissions, filed on 9th August, 2013. In summary, its case is as follows:
Firstly, that under Article 5(1) of the Protocol, only the African Commission on Human and People's Rights, State Parties and African Inter-governmental Organizations have automatic access to the African Court on Human and People's Rights and that the State parties at their discretion can grant NGOs and individuals access to the Court by making declarations similar to the one made by Rwanda on 22nd January,2013 and by the United Republic of Tanzania on 29th March,2010. By not doing so, the 2nd, 3rd and 5th Respondents have created a "disturbing situation" which has seriously affected "the entire system of judicial protection of human rights at the regional and continental level".
Secondly, that the Applicant has made demands to the Respondents, including the 1st Respondent, to remedy the above situation but no action has been taken and the result is that there is no external mechanism for protecting individuals from any excesses of the State with regard to human rights and there is, therefore, a great need

to grant NGOs and individuals locus standi to institute cases directly against erring States.

Thirdly, that the failure/refusal, delay and inaction of the 2nd, 3rd and 5th Respondents to deposit the declarations aforesaid is an infringement of the fundamental principles of "good governance, including adherence to the principles of democracy, rule of law, social justice and the maintenance of universally accepted standards of human rights" which are enshrined in Articles 5, 6, 7(2), 8(1)(c), 126 and 130 of the Treaty which is itself founded on the African Charter.

Fourthly, that the State parties to the Treaty are members of the United Nations and subscribe to the principles contained in the Universal Declaration of Human Rights, 1948, and have also ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Human, Social and Cultural Rights (ICHSCR) and have institutionalized annual meetings of Human Rights Organizations to enable an exchange of views and sharing of progress on implementation of human rights programmes at national level in accordance with the above international instruments.

That this has been done in addition to *inter-alia* the development of an EAC Plan of Action on Human Rights and the draft Protocol on Good Governance.

Lastly, that by not depositing the declarations under Article 34(6) of the Protocol, the 2nd, 3rd and 5th Respondents' inaction has the inconsistent effect of limiting the right to freedom, liberty, fair hearing, freedom of association and have discriminated against the Applicant and its members, as well as other citizens of East Africa who would wish to challenge human rights violations in the African Court.

10. That the complaints made in the Reference are therefore well founded and the Applicant is deserving of the declaratory orders set out elsewhere above.

**Case for the 1st Respondent**

11. The 1st Respondent filed a response to the Reference on 8th March, 2012 and submissions on 6th August, 2013 and his case is as follows:
    i) that no cause of action is disclosed against him on a plain reading of Article 34(6) of the Protocol which neither sets a time limit for the making of declarations nor does it render the making of such declarations mandatory.
    ii) that no provision of the Treaty obliges the 1st Respondent to compel a State Party to make a declaration in terms of Article 34(6) of the Protocol and the Reference is therefore misguided.

    Further and in any event, this Court has no jurisdiction to determine the Reference as it is being called upon to interpret provisions of the Protocol to the African Charter on Human and People's Rights on the Establishment of the African Court and neither Articles 6, 7(2), 8(1)(c), 13, 27(1) and 30 of the Treaty confer such jurisdiction. That the right forum to address the Applicant's complaint is the African Court through the African Commission on Human and People's Rights and not this Court.

12. Regarding the 1st Respondent's obligations under the Treaty, it is his case that he has no supervisory powers over the Partner States as to their obligations under the African Charter and the Protocol and, therefore, there has been no infringement of the Treaty to warrant a cause of action against him. In any event that he, out of abundant

caution, indeed sought a clarification from the 2nd, 3rd and 5th Respondents as to the reasons why they had taken no action pursuant to Article 34(6) aforesaid but his letter dated 5th March, 2012 has elicited no response and so he has left the matter for the Court's determination.

13. It is his concluding argument that for the above reasons, the Reference as filed has no merit and should be dismissed.

**Case for the 2nd Respondent**

14. The 2nd Respondent filed a Response to the Reference on 23rd March, 2012 and urged the point that the delay in depositing a declaration under Article 34(6) does not in any way constitute a violation of any provision of the Treaty. In any case that since there is no time limit set to do so, no legal obligation is specifically conferred on any party to the Protocol in that regard and the Reference as crafted is vague, argumentative, scandalous, embarrassing and discloses no cause of action against the 2nd Respondent.
15. Further, that this Court has no jurisdiction to interpret any provision of the African Charter and its Protocols and should be dismissed with costs.

**Case for the 3rd Respondent**

16. The 3rd Respondent's case as contained in its response to the Reference dated 16th March, 2012 and a replying Affidavit sworn on 28th February,2013 by Prof. Githu Muigai, the Attorney General of the Republic of Kenya, is that the Applicant has no locus standi to institute any proceeding in this Court or even in the African Court because it is neither an NGO with observer status before the African Commission on Human and People's Rights nor is it an individual with legal capacity within the context of the African Charter. This means that even if the Republic of Kenya had complied with Article 34(6) of the Protocol, the Applicant would still not have been able to institute any cases directly to the Court, a fact that would render his Reference moot.
17. Further, that under Article 11(3) of the Treaty, it is the Summit that should review the state of good governance within the Community and Kenya has in any event adhered to the principles of good governance, rule of law, social justice and maintenance of universally accepted standards of human rights and has taken constitutional steps to bind all State organs, State offices and Public offices and all other persons to the same standards. In that regard, reference has been made to Articles 2(5), 2(6) and 10 of the Constitution of the Republic of Kenya which provide for the place of general rules of International Law and Treaties in the Laws of Kenya as well as national principles of governance including good governance and human rights, respectively. Reference has also been made to decisions of the High Court of Kenya where the government has been held liable for past violations of human rights and the point made is that Kenya has a robust judicial system that is capable of granting justice for alleged violations of human rights and there is no urgent need for recourse to any other court system including the African Court.
18. On jurisdiction, the 3rd Respondent has urged this Court to decline the invitation to assume jurisdiction in matters involving the African Charter and the Protocol and

to hold that Kenya's discretion to deposit a declaration under Article 34(6) of the Protocol is not subject to this Court's jurisdiction.

19. Lastly, that since the Reference does not seek the annulment of any Act, regulation, directive, decision or action within the meaning of Article 30 of the Treaty as read with Rule 24 of this Court's Rules of Procedure, it should be struck out with costs as against the 3rd Respondent.

**Case for the 5th Respondent**

20. By its Response to the Reference filed on 26th March, 2012, the 5th Respondent has urged that this Court should "declare itself incompetent to hear and determine this Reference" and should instead dismiss it with costs as against the 5th Respondent for reasons *inter-alia*: That in matters of good governance affecting the East African Community, only the Summit can review the state of affairs in that regard under Article 11(3) of the Treaty and like Kenya, the Republic of Burundi has taken all measures in its Constitution and the Treaty as regards adherence to "the principles of good Governance, rule of law, social justice as well as recognition, provision and Protection of human and peoples' rights in accordance with the provisions of the African Charter ….".

    Further, that this Court has no jurisdiction to determine the Reference which is filed contrary to the provisions of Article 30(1) of the Treaty.

    Lastly, that this Court has no jurisdiction to "review the provisions of the Protocol to the African Charter … on the Establishment of an African Court on Human and Peoples' Rights."

**Scheduling Conference**

21. On 1st February, 2013, parties attended a Scheduling Conference convened by the Court and the following points were found to be subject to no dispute:
    a) that the 2nd, 3rd, 4th and 5th Respondents all signed, ratified and acceded to the Charter, the Protocol and the Treaty.
    b) that there are triable issues based on the provisions of Articles 6, 7, 27 and 30 of the Treaty for The Establishment of the East African Community.
    c) that the 4th Respondent only deposited a declaration under Article 34(6) of the Protocol after the commencement of these proceedings.
22. The following were distilled as points of disagreement and which now require this Court's determination:
    1) Whether the Court has jurisdiction to entertain this Reference.
    2) Whether the issues as presented were justiciable.
    3) Whether the Application discloses a cause of action against the 1st and 4th Respondents.
    4) Whether the Applicant has locus standi to present the Reference.
    5) Whether the delay by the 2nd to 5th Respondents to deposit their respective declarations is a violation of Articles 5, 6, 7, 8(1)(c), 126 and 130 of the Treaty; Articles 1(2), 7, 13, 26, 62, 65 and 66 of the African Charter on Human and People's Rights (the Charter) and Articles 1, 3, 5, and 34 of the Protocol on the African Charter on Human and Peoples' Rights on the Establishment of the

African Court on Human and Peoples' Rights (the Protocol).

6) Whether the 1st Respondent has a duty under the Treaty, the Charter or the Protocol to compel and/or supervise the 2nd, 3rd and 5th Respondents to deposit declarations under Article 34(6) of the Protocol.
7) Whether the parties are entitled to the remedies sought.

**Determination of the Issues**

Applicable Rules and Principles of Interpretation

23. The Treaty, as has been stated previously by this Court, is an International Treaty and subject to International Law of Treaties and specifically Article 31(1) of the Vienna Convention on the Law of Treaties which has set out the general rule in the interpretation of treaties as, that:
    a) a treaty shall be interpreted in good faith and
    b) in accordance with the ordinary meaning to the terms of the Treaty in their context, and
    c) in the light of the object and purpose of the Treaty.
24. We shall apply the above principles in determining the issues framed above and in addition, we shall be guided by, and remain faithful to the jurisdiction conferred on this Court by the Treaty.

    Issue No.1: Whether this Court has Jurisdiction to entertain the Reference
25. The objection made by the Respondents jointly and severally on this issue is that because the Applicant's complaint is principally premised on the question whether the Respondents' delay in depositing declarations pursuant to Article 34(6) of the Protocol, then this Court has no jurisdiction over the dispute and that the proper forum to resolve it is the African Court on Human and Peoples' Rights through the African Commission.

    If that be so, then the issue of jurisdiction is one that this Court has on more than a dozen occasions addressed - see for example *Mtikila & Others vs Attorney General of the United Republic of Tanzania Ref. No.2 of 2007*. But what is the meaning that we shall attribute to "jurisdiction" in the context of the issue at hand? We agree with counsel for the 2nd Respondent that the definition given in the Dictionary of Words and Phrases Legally Defined is appropriate in the present circumstances where it is defined as:

    "The authority which a Court has to define matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are inspired by statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means".
26. The jurisdiction conferred on this Court following the above definition is to be found in Article 23(1) of the Treaty which provides as follows:

    "The Court shall be a judicial body which shall ensure the adherence to the Law in the interpretation and application of and compliance with this Treaty".
27. A closely related but distinct provision is Article 27(1) of the Treaty which states that:

    "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".

28. The Treaty, and of importance in the present Reference, also provides in Article 30 that:

"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;

3. 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."

29. The Respondents have urged the point that since the Court's jurisdiction is limited to "the interpretation and application of the Treaty", no jurisdiction is conferred on it to interpret other Treaties or international instruments such as the Charter and the Protocol. That may well be true but, with respect, the Respondents have completely misunderstood what jurisdiction is in the present context.

30. Jurisdiction is quite different from the specific merits of any case and their arguments on this point will best be addressed when dealing with issue No.5: whether the delay in depositing declarations is an infringement of the Treaty.

31. As it is, it should be noted that one of the issues of agreement as set out by the parties is that there are triable issues based on Articles 6, 7, 27 and 30 of the Treaty. That is correctly so because once a party has invoked certain relevant provisions of the Treaty and alleges infringement thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 determine whether the claim has merit or not. But where clearly the Court has no jurisdiction because the issue is not one that it can legitimately make a determination on ,then it must down its tools and decline to take one more step- (see *Owners of Motor Vessel 'Lillian S' vs Caltex Oil (Kenya) Ltd 1989 [KLR)1*).

32. Indeed, this Court has in the past ruled that it has no jurisdiction in a number of cases including:

    a) *Modern Holdings Ltd (EA)Ltd vs. Kenya Ports Authority, Ref. No.1 of 2008* where the court stated that it had no jurisdiction because the Respondent could not be properly sued since it was not a surviving institution of the former East African Community to be sued within the contemplation of the Treaty.

    b) *Mtikila vs. Attorney General of the United Republic of Tanzania (supra)* where the court held that it had no jurisdiction to entertain an application filed to seek an annulment of elections held by the National Assembly of Tanzania.

33. None of the above situations can properly be invoked in the instant case. This is because the Applicant has specifically alleged that the Respondents' actions or indeed alleged inactions are an infringement of Articles 5, 6. 7(2), 8(1)(c), 23, 27(1), 30, 33, 126, 130 and 131 of the Treaty and this Court can properly interrogate that complaint

within its Treaty – given mandate and whether indeed the complaint is meritorious is not a matter of jurisdiction per se.

34. Turning back to the issue whether this Court can purport to interpret the provisions of other Treaties, the issue is simple and portends no difficulty at all because jurisdiction is conferred by 'a statute, charter or commission under which a court is constituted'. In the case of this Court, the Treaty confers jurisdiction and we have explained above in what instances and specifically under Article 30.The same Article denies jurisdiction in other instances but where violation of it is alleged, the Court cannot shy away from its jurisdiction to interrogate those allegations. We are of course aware that this Court in the case of *Rugumba vs Attorney General of Rwanda, Reference No.8 of 2010* invoked the African Charter on Human and People's Rights to find in favour of the Applicant but it must be understood that the said finding was made in the context of specific violations of Article 6(d) of the Treaty and not the Charter per se.

    We shall therefore hold and find that we have the requisite jurisdiction to determine the issues raised in the Reference, but subject to what we shall say later about the Court's jurisdiction as regards interpretation of other international instruments and specifically the African Charter and the Protocol.

    Issue No.2: Whether the Issues raised in the Reference are Justiciable

35. On this issue, the Respondents made the point that the issues raised are not justiciable in that it is not the province of this Court to compel a Partner State to perform a purely Executive function.
36. The Applicant on the other hand went into great detail to show why the issues raised are all about access to justice and that the defence of sovereignty is not available to the Respondents since they ceded part of their sovereignty when they acceded to the African Charter and the Treaty. That once this was done, then by denying NGOs and individuals access to the African Court, the Respondents were acting in violation of the Treaty and the issues placed before the Court are, therefore, justiciable.
37. "Justiciable" has been defined to mean "of a case or dispute properly before a Court of Justice; capable of being disposed of judicially in a justiciable controversy" – *Black's Law Dictionary, 9th Edition* "Justiciability" has been defined in the same dictionary as "the quality or state of being appropriate or suitable for adjudication by a Court".
38. Of interest in the *Black's Law Dictionary* at page 943 is the following statement:
    "Concepts of justiciability have been developed to identify appropriate occasions for judicial action …. The central concept often is elaborated into more specific categories of justiciability - advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions and administrative questions."
39. The 2nd Respondent in submissions has specifically made the argument that the issues raised involve political questions which the Court should refuse to take cognizance of or decide, on account of their purely political character, or because their determination would involve an encroachment upon the Executive or Legislative domains.
40. All the arguments made by the Respondents on this point would otherwise have had merit but for the fact that in the Scheduling Conference, parties agreed that "the Reference raises triable issues based on the provisions of Articles 6, 7, 27(1) and 30 of

the Treaty…." We hold the same view and in discussing the issue of jurisdiction, we alluded to the fact that once there are triable issues, then the Court, barring a specific exclusion as to jurisdiction must proceed and seize the question for determination on their merits.

41. "Triable" has been defined to mean "subject or liable to judiciable examination and trial" – *Black's Law Dictionary (supra)*.
    In that regard, Article 6(d) of the Treaty provides as follows:
    "The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:
    "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."
42. Article 7(2) then provides that:
    "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."
43. We have elsewhere above reproduced Articles 27 and 30 of the Treaty and read in the context of the present Reference (and we must reiterate the point), the question before the Court is whether the actions or inactions of the Respondents violate Articles 6(d) and 7(2) *inter-alia*. We have held that this Court has jurisdiction to determine that question and it is also obvious to us that the issue is both triable and justiciable and we decline the invitation to treat it as a purely political question.
44. In the event we find that the issues placed before us are justiciable and we shall in addressing the remaining issues, reach a fair determination of the one fundamental issue in controversy.
    Issue No3: Whether the Application discloses a Cause of Action against the 1st and 4th Respondents
45. The "Application" should be taken to mean the present Reference and elsewhere above, we noted that the Applicant withdrew all complaints against the 4th Respondent subject to the issue of costs and so the question as framed, must be answered with regard to the 1st Respondent only.
46. The 1st Respondent has urged that he has no role in the matter at hand and that he has no supervisory role over the Partner States as regards their commitments outside the Treaty.
47. The Applicant's position is to the contrary and to us, the issue again portends no difficulty at all. The Treaty in Article 67 creates the office of the Secretary General of the East African Community and sets out his duties in Article 67(3) which includes being "the head of the Secretariat." Article 71 sets out the functions of the Secretariat which are not important to restate but Article 29 grants the Secretary General the mandate to submit his or her findings to a Partner State if he considers "that a Partner State has failed to fulfill an obligation under [the] Treaty or has infringed a provision of [the] Treaty" and if the response is not satisfactory, he may refer it to this Court for resolution or to the Council and if no resolution is made either way, thence to this

Court for a final decision thereof.

48. In his Response to the Reference, the 1st Respondent indicated that once he got wind of the Applicant's complaint, he wrote to all the Respondents seeking a clarification on the matter and once the Reference was filed, he left the matter in the hands of the Court.
49. The Applicant, however, considers that the 1st Respondent should have done more but we disagree. The principal issue before us is whether delay in depositing declarations under Article 34(6) of the Protocol was in violation of the Treaty. In our view, the 1st Respondent did what he would in his circumstances and once the matter was placed before this Court, he had nothing more to do. He has no specific role under the African Charter and Protocol and to expect him to do more than he did would be unreasonable. Like the 4th Respondent, he has already acted as required by law and the cause of action even if it existed, no longer subsists as against him and he is improperly before this Court as ultimately no specific order of value and substance can be made against him.
50. A "cause of action" has been defined to be "a group of operative facts giving rise to one or more bases for suing; a factual situation that entities a person to obtain a remedy in Court from another person" – *Black's Law Dictionary (supra)*. *Spry V-P in Auto Garage vs. Motokov No.3(1971) EA 514* stated that where any essential ingredient forming a cause of action is missing, then "no cause of action has been established." We agree and in the context of the present Reference, neither the facts nor the eventual remedy to be granted or denied would create a cause of action against the 1st Respondent and we so find.

    Issue No.4: Whether the Applicant has Locus Standi to present the Reference
51. The argument made by the Respondent on this is issue that the Applicant's Reference is supported by an Affidavit sworn by one Mathias Nsubuga, who, contrary to the deposition made in that Affidavit was not the Secretary General of the Democratic Party of Uganda and his purported election to that position had been overturned by the High Court of Uganda in the Case of *Ochieng S. C. Peter & 5 Others vs. President General Democratic Party Misc. Cause No. 217/2008*. However, in the course of these proceedings, it emerged that the issue had been resolved and indeed Mr. Nsubuga was lawfully in office as Secretary General of the Applicant Political Party.
52. There was no other serious issue raised on locus standi and so the issue requires no more than a resolution in the negative as it is moot.

    Issue No.5: whether the delay by the 2nd and 5th Respondents to Deposit their Respective Declarations is a Violation of Articles 5, 6, 7, 8(1) (c), 126, and 130 of the Treaty; Articles 1(2), 7, 13, 26, 62, 65, and 66 of the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (the Protocol).
53. This issue forms the substratum of the Reference and the Respondents have urged the point that whether or not this Court has jurisdiction to determine the issue, there is no time frame for them to deposit their declarations under Article 34(6) of the Protocol and the issue of delay or inaction does not thereby arise.
54. The Applicant has however framed the issue as a wider matter of access to justice and that the delay aforesaid is a violation of the principles governing the achievement of

the objectives of the East African Community. Of interest is the reliance placed on the decision of the African Court in *Michelo Yogogambaye vs. Senegal File No.001/2008* to show that unless the declarations are deposited, then like *Yogogambaye*, the right of access to the African Court would continue to be curtailed. In that case, the African Court held that since the Republic of Senegal had not deposited a declaration under Article 34(6) of the Protocol, then the Court could not entertain a case of alleged human rights violation by any NGO or individual from Senegal.

55. The starting point of the determination of this issue must be a resolution of the question whether this Court can properly delve into obligations created on the Respondents by other international instruments. We have elsewhere above said something about the issue and in that regard, the answer must be an emphatic NO.
56. This Court can only "interpret" and "apply" the Treaty under Article 27 and in doing so, adherence to law in the interpretation and application of and compliance with "the Treaty" shall be its guiding principle under Article 23. Further, in doing so, it can only inquire into "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 an Act, regulation, directive, decision or action is unlawful or is an infringement of the principles of [the] Treaty" within the meaning given by Article 30 thereof.
57. 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."
58. Reading the above Articles together, it is obvious to us that where a Partner States "fails to honor commitments made" to other international organizations, then with appropriate facts placed before the Court, a decision to ensure compliance therefore may be made in favour of a party that fits the description in Article 30 of the Treaty and which has a genuine complaint in that regard. In fact in Article 130(4), the Organization of African Unity, 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 Partner States acted to the contrary.
59. 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.

60. The second aspect of this issue to address is the aspect of "delay" in depositing the declarations.
61. Delay presumes that the Partner States have an obligation to a time frame for doing so, but the language of Article 34(6) of the Protocol to the contrary is merely that the State Partners shall do so "at the time of the ratification of the Protocol or any time thereafter."
62. There is no certainty in the above expression and in fact there is no obligation to "expeditiously" deposit the declarations or to do so by a certain date or to do so because the United Republic of Tanzania has done so but the entire process is left to the sole discretion of the State Party. Delay cannot in such circumstances be attributed to a party in a vacuum and that is all there is to say.
63. Lastly, therefore, has the delay caused a violation of the Treaty? Of course not and it is obvious why. The facts cannot point to a violation where the sole discretion is left to the Partner State. Even if this Court could properly invoke Articles 6(d), 7(2), 126 and 130 as it has, the facts do not point to a violation and if there is a violation of the African Charter and Protocol, this is not the forum to challenge such violation in the circumstances of this case.
64. In fact, to our minds, the Applicant made a mountain out of an anthill. We say so, with tremendous respect, because whereas we see the difficulty created by Article 34(6) of the Protocol and whereas we note the importance attributed to the issue at hand, the simple issue of the alleged delay and timeframe to deposit the declarations did not require more than this simple answer; there is no connection between the issue and the Treaty.

    This issue must be answered in the negative and we have shown why.

    Issue No.6: Whether the 1st Respondent has a duty under the Treaty, the Charter or the Protocol to compel Control or supervise the 2nd, 3rd 4th and 5th Respondents to deposit Declarations under Article 34(6) of the Protocol
65. We are of the view that our answer to Issue No. 3 sufficiently disposes of this issue and we need say no more.

    Issue No.7: Whether the Parties are entitled to the Remedies Sought
66. We have said enough to show that the Reference is misguided on the main issue for determination. We are aware that other African Countries in their own wisdom have already deposited the declarations under Article 34(6). They include the United Republic of Tanzania, Burkina Faso, Malawi, Mali and the Republic of Rwanda. They did so in their own time – 1998, 2008, 2010 and 2013, respectively. Neither the 1st Respondent nor this Court can compel the 2nd, 3rd, and 5th Respondents to do so and the reasons are obvious.
67. Lastly, there is the issue of costs. The Applicant has not succeeded but even in the case of the Republic of Rwanda which only deposited the declarations after being served with this Reference, we do not deem it fit to penalize the Applicant with costs as it was pursuing a purely public interest matter.
68. Let each Party, therefore, bear its own costs.

**Conclusion**

69. We would wish to thank the advocates for the Parties for their incisive and illuminating submissions and authorities cited. That we did not cite or quote all of them does not mean that they were of no help.
70. In any event, the Reference is hereby dismissed with the further order that each Party shall bear its own costs.

Orders accordingly.

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East African Court of Justice – First Instance Division
Reference No. 3 of 2012

**Hilaire Ndayizamba And The Attorney General of the Republic of Burundi and The Secretary General of the East African Community**

Mary Stella Arach-Amoko, DPJ; John Mkwawa, J, Faustin Ntezilyayo J.
February 28, 2014

*Limitation period - The concept of legal continuing violations not applicable- Whether the Court was vested with the jurisdiction to entertain the Reference.*

*Articles: 6(d), 23, 27, 30(2) of the Treaty Establishing the East African Community - Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure.*

On 15th October 2009, the Applicant, a businessman, was arrested by the Public Prosecutor of Burundi on suspicion of having assassinated one Ernest Manirumva, then Vice President of OLUCOME (a Burundian anti-corruption Non-Governmental Organization), on the night of 8th-9th April 2009. On 22nd February 2012, the First Instance Tribunal of Bujumbura condemned Mr. Hilaire Ndayizamba to life imprisonment for the murder of Ernest Manirumva. An appeal against the life sentence was immediately made to the Court of Appeal of Bujumbura. On 25th January 2013, the Court of Appeal of Bujumbura quashed the appeal and confirmed the life sentence. The Applicant through his Counsel applied for review of the judgment in the Review Chamber of the Supreme Court of Burundi and the matter was still pending at the time of the Reference.

The applicant avers that upon his arrest, he was arbitrarily and unlawfully detained by agents of the 1st Respondent contrary to the time prescribed in the Burundi Code of Penal Procedure and this infringed Article 6(d) of the Treaty. He further claims that the matter gained so much notoriety that the 2nd Respondent was bound to have known and ought to have taken action pursuant to Articles 29(1) and 71(1) (d) of the Treaty.

**Held:**

1) The Court had no jurisdiction to grant prayers relating to the Applicant's right to enjoy his freedom without prior conditions or to order his immediate release as this was outside the Court's jurisdiction.
2) The Applicant's detention that triggered this claim was well known by 15th June 2011 and no reasons were offered as to why the Reference was filed outside the time prescribed by Article 30(2) of the Treaty. The Reference was therefore dismissed as being time-barred.

**Cases cited:**

James Katabazi & 21 Others v. Secretary General of the EAC & Attorney General of Uganda, EACJ Ref. No.1 of 2007

Plaxeda Rugumba v Attorney General of Rwanda, EACJ Reference No. 8 of 2010

Professor Peter Anyang' Nyong'o & 10 others v Attorney General of Kenya & 3 others, EACJ Ref. No.1 of 2006

**Judgment**

**Introduction**

1. This is a Reference by one Hilaire Ndayizamba, a resident of the Republic of Burundi, (hereinafter referred to as the "Applicant"). His address for the purpose of this Reference is indicated as c/o Mr Isidore RufyikirI, Avenue Nicholas Mayugi-'Ku Mugumya', P.O. Box 1745 Bujumbura, Burundi.
2. The Reference was filed on 23rd February 2012 under Article 30 of the Treaty Establishing the East African Community and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as the "Treaty" and the "Rules", respectively). It is also premised on Articles 3(3) (b), 6(d), 7(2), 8(4), 27(1) and 30(1) and (2) of the Treaty.
3. The Respondents are the Attorney General of the Republic of Burundi and the Secretary General of the East African Community who are sued on behalf of the Government of the Republic of Burundi and of the East African Community in their respective capacities as the Principal Legal Adviser of the Republic of Burundi and the Principal Executive Officer of the Community.

**Representation**

4. The Applicant was represented by Mr. Isidore Rufyikiri. Mr. Nestor Kayobera appeared for the 1st Respondent, while Mr. Wilbert Kaahwa, Learned Counsel to the Community appeared for the 2nd Respondent.

**Background**

5. The undisputed background to this Reference is as follows:
   On 15th October 2009, Mr. Hilaire Ndayizamba, a businessman, was arrested by the Public Prosecutor of Burundi on suspicion of assassination of one Ernest Manirumva, then Vice President of OLUCOME (a Burundian anti-corruption Non-Governmental Organization), who was assassinated in the night of 8th-9th April 2009.
   On 22nd February 2012, the First Instance Tribunal of Bujumbura condemned Mr. Hilaire Ndayizamba to life imprisonment for the murder of Ernest Manirumva. An appeal against the life sentence was immediately made to the Court of Appeal of Bujumbura.
   On 25th January 2013, the Court of Appeal of Bujumbura quashed the appeal and confirmed the life sentence. The Applicant through his Counsel applied for review of the judgment in the Review Chamber of the Supreme Court of Burundi and the matter was still pending at the time of the Reference.

**The Applicant's Case**

6. The Applicant's case is contained in the Reference, an affidavit in support sworn on 22nd February 2012 by one Deo Nzeyimana, the Applicant's reply to the amended 1st Respondent's Response to the Reference filed on 26th March 2013, as well as his Counsel's oral submissions made on 8th November 2013.
7. Briefly, the Applicant avers that on 15th October 2009, he was arrested on suspicion that he had committed murder of one Ernest Manirumva. He alleges that following his arrest, he was not charged within the time prescribed by the Burundi Code of Penal Procedure and has since then been subjected to arbitrary and unlawful detention by agents of the Government of Burundi.
8. He claims that the acts/omissions of the Government of Burundi was an infringement of Article 6(d) of the Treaty since they violate the fundamental principles of the East African Community. He further claims that the matter gained so much notoriety that the 2nd Respondent is bound to have known and ought to have taken action pursuant to Articles 29(1) and 71(1) (d) of the Treaty.
9. The Applicant therefore seeks declarations from the Court that:
    a) Keeping him in detention is an infringement of Article 6(d) of the Treaty;
    b) The Secretary General failed to fulfil his obligations under Articles 29 and 71(1) (d) of the Treaty;
    c) He has a full right to enjoy his freedom without any prior condition;
    d) An order that he be immediately released;
    e) The costs of the reference.

**First Respondent's Case**

10. The 1st Respondent's case is set out in his response and amended response to the Reference filed on 26th March 2012 and 22nd February 2013 respectively.
11. In a nutshell, his response is as follows:-
    a) That the Court has no jurisdiction in the matter of this Reference;
    b) That no violation of the Treaty occurred by the arrest and detention of the Applicant since this was done in accordance with the law of the Republic of Burundi;
    c) He therefore prays that the Court should dismiss the Reference with costs.

**Second Respondent's Case**

12. The 2nd Respondent filed his Response on 5th April 2012.
13. Affidavits in support of the response sworn by Dr. Julius Tangus Rotich and Mr. Jean Claude Nsengiyumva were filed on 13th March 2013 and 5th April 2013 respectively. The 2nd Respondent also relies on his written submissions filed on 22nd May 2013. His case is as follows:-
    a) The 2nd Respondent has denied all responsibility in the matter before the Court as he was at all material times not aware of the alleged arrest and detention of the Applicant to prompt him to undertake any such investigations as he would in the discharge of his duties deem apt.
    b) That as soon as he learnt of the Applicant's case, he took action with the Government of the Republic of Burundi;

c) In the premises, he pleads that the granting of the Declaratory Order and other Reliefs sought by the Applicant against him does not arise.

**Scheduling Conference**

14. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 25th January 2013 at which the following were framed as points of agreement and disagreement respectively:

**Points of Agreement**

Both parties agreed that the Reference raises triable issues based on the provisions of Articles 6, 27, 29, 30 and 71(1) (d) of the Treaty meriting adjudication and pronouncement by this Court.

Points of disagreement/Issues for determination by the Court

The parties framed the following issues for adjudication by the Court:

a) Whether the Court is vested with the jurisdiction to entertain this Reference;
b) Whether the Applicant's detention is an infringement of Article 6(d) of the Treaty by the 1st Respondent;
c) Whether the 2nd Respondent has failed to fulfil his obligations under Articles 29 and 71(1)(d) of the Treaty;
d) Whether the Applicant is entitled to the Declaratory Orders he seeks.

15. In his written submissions, Counsel for the 2nd Respondent raised yet another preliminary point that the Reference is time-barred.

It was agreed at the aforesaid 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.

The parties noted that the case presented no possibility of mediation, conciliation or settlement.

**Determination of the issues by the court**

16. Applicable Rules and Principles for Interpretation: The Court has constantly stated that the Treaty, being an international treaty, is subject to International Law of Treaties, specifically Article 31(1) of the Vienna Convention on the Law of Treaties which has set out the general rule in the interpretation of treaties, that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to the terms of the Treaty in their context, and in the light of the object and purpose. We shall apply the above principles in deciding the case before the Court and in addition, we shall be guided by relevant provisions of the Treaty governing the Court's jurisdiction. Issue No.1: Whether the Court is vested with the jurisdiction to entertain this Reference

**Submissions**

17. In his oral submissions, Counsel for the Applicant argued that, according to Article 75 of the Burundi Code of Penal Procedure (Act No.1/015 of 20th July 1999), as long as a detainee has not been produced before a criminal court for trial, it is mandatory for the Public Prosecutor to present him before the competent judge for verification

of the detention every 30 days, otherwise he has to release him automatically since he would have no more legal power to keep him in detention. He then submitted that from 17th March 2010 when the Applicant appeared before the judge of detention until 14th July 2010 when he appeared before the High Court of Bujumbura, more than thirty days had passed, and hence, his detention was illegal and unlawful because it violated the abovementioned provisions.

18. Further, Counsel maintained that despite the fact that the Applicant had been subsequently condemned to life imprisonment by the Tribunal of First Instance of Bujumbura and that sentence was confirmed by the Court of Appeal of Bujumbura, his client continued to endure an arbitrary detention in light of the aforesaid provisions of Article 75 of the Burundi Code of Penal Procedure.
19. Given the foregoing, Counsel contended that the said detention constituted an infringement of the fundamental principles of good governance and rule of law enshrined in Article 6(d) of the Treaty by the Government of the Republic of Burundi. It is, therefore, his submission that the Court has the jurisdiction to interpret and apply the Treaty as it was decided in *Attorney General of the Republic of Rwanda Vs. Plaxeda Rugumba, EACJ Appeal No.1 of 2012* and *James Katabazi & 21 others Vs. Secretary General of the EAC & Attorney General of Uganda, EACJ Ref. No.1 of 2007*. In addition, Counsel argued that under Article 23(1) of the Treaty, the primary role of the Court as per the Treaty is to ensure adherence to the law in interpretation and application of compliance with the Treaty. Therefore, Counsel submitted that the Court has jurisdiction to entertain this Reference.
20. In his response, Counsel for the 1st Respondent argued that the murder case having been presented before competent judicial bodies of the country, the Court ought not to interfere in criminal matters undergoing national legal and judicial processes.
21. He asserted that the preventive detention of the Applicant was lawful on the grounds that it was done pursuant to the Burundian law, namely Articles 71, 72 and 75 of the Burundi Code of Penal Procedure and Article 205 of the Constitution.
22. Counsel further submitted that although, under Article 23(1) and Article 27(1) of the Treaty, the Court has jurisdiction over the interpretation and application of the Treaty, it does not, however, under Article 27(2) and 30(3) of the Treaty have jurisdiction to entertain prayers (a), (c) and (d) sought by the Applicant.
23. In support of his contention, he relied on *Attorney General of Kenya Vs. Omar Awadh and 6 others, EACJ Appeal No. 2 of 2012* and contended that the Court does not have jurisdiction to entertain the prayer asking the Court to declare null and void the decision of keeping the Applicant in detention [part of prayer (a)], the prayer asking the Court to declare that the Applicant has a full right to enjoy his freedom without any prior conditions [prayer c] and the prayer seeking an order that the Applicant be immediately released [prayer (d)].
24. On his part, Counsel for the 2nd Respondent joined issue with Counsel for the 1st Respondent and submitted that the Court has jurisdiction to interpret and apply the provisions of the Treaty, including Articles 6(d), 7(2) of the Treaty as was decided in *Plaxeda Rugumba's case (supra) and James Katabazi's case (supra)*.
25. He then argued that in respect of some of the prayers sought by the Applicant, namely part of prayer (a), and prayers (b) and (e), the Court in exercise of its interpretative

jurisdiction under Article 27(1) of the Treaty may grant relief if on the evidence by the Applicant that relief arises.

26. Counsel hastened to add, however, that in respect of remedies under paragraphs (c) and (d) of the Reference which are matters of human rights and matters of municipal jurisdiction, and as was stated by this Court in the *Plaxeda Rugumba's case (supra)*, the Court will not exercise jurisdiction.

**Decision of the court on issue no.1**

27. Given the factual background of the Reference, the Court has to examine whether it has the requisite jurisdiction to determine the Applicant's allegations against the Respondents. In that regard, the starting point is Article 23(1) of the Treaty as read together with Article 27 from which the Court derives its mandate. Article 23 provides that:

"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."

Article 27 states that:

"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 operationalize the extended jurisdiction."

28. At the Scheduling Conference, parties agreed that the Reference raised triable issues meriting adjudication and pronouncement by this Court. However, Counsel for the Respondents have contended that the Court is only competent to entertain the Applicant's prayers pertaining to the interpretation and application of the Treaty. Counsel for the 2nd Respondent further argued that the Court cannot determine issues raising human rights matters since such a jurisdiction still awaits the operationalization of a Protocol under Article 27(2) of the Treaty.

29. It is common knowledge that the extended jurisdiction as envisaged by Article 27(2) of the Treaty has not been conferred on this Court as decided especially in J*ames Katabazi's case (supra) and Plaxeda Rugumba & Attorney General of Rwanda, EACJ Ref. No. 8 of 2010*. We need not elaborate on this matter since it has been extensively debated in the said cases. It is, however, worth mentioning that the Reference before the Court invokes the Court's jurisdiction to interpret and apply the provisions of the Treaty. The Applicant seeks, among others, to invoke the Court's jurisdiction to hear and determine whether the 1st Respondent has breached the fundamental principles of the Treaty set out in Article 6(d) by keeping him in detention and whether the 2nd Respondent has violated Articles 29 and 71 (1) of the Treaty.

30. We wish to point out that Article 6(d) of the Treaty states that one of the fundamental Principles that shall govern the achievement of the objectives of the Community by the Partner States is:

"good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunity, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter of Human and Peoples' Rights."

31. Given the foregoing and guided by the Court's previous decisions on similar matters [see for example – *Plaxeda Rugumba's case (supra), Professor Peter Anyang' Nyong'o & 10 others Vs. Attorney General of Kenya & 3 others, EACJ Ref. No.1 of 2006; James Katabazi's case (supra)*], we are of the decided opinion, and in agreement with the Respondents, that the Court has jurisdiction to entertain prayers (a), (b) and (e) of the Reference, and that it is not clothed with the jurisdiction to grant prayers (c) and (d), since the latter clearly falls outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

**Whether the Reference is Time-barred**

32. As stated earlier, this issue was raised as a preliminary objection by Counsel for the 2nd Respondent. It is necessary to deal with it at this stage, since if it is answered in the affirmative, it would dispose of the whole Reference.
33. Counsel for the 2nd Respondent submitted that in light of the limitation period set to institute references of this nature pursuant to Article 30(2) of the Treaty, the matter was time-barred and the Reference should be dismissed with costs. 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."
34. To buttress his assertion that the instant case was filed out of time, Counsel referred to Applicant's relevant averments contained in paragraphs 10 to 15 of the Reference, and paragraphs 12 to 17 of Deo Nzeyimana's affidavit in support of the Reference. It is his contention, therefore, that since the impugned detention commenced on 15th June 2011, which is the date on which the Tribunal of First Instance made its decision and given that the Applicant was aware of the impugned infringement as of the above mentioned date, but chose to file his Reference only on 23rd February 2012, the said Reference was manifestly filed outside the two-month period prescribed by Article 30(2) of the Treaty.
35. Furthermore, relying on *Omar Awadh's case (supra)*, learned Counsel asserted that the Appellate Division of this Court, while considering the scope of Article 30(2) of the Treaty, held that the starting date of an act complained of under the said article (including the detention of a complainant), is not the day the act ends, but the day when it is first effected. He also cited an extract of the decision in *Independent Medico Legal Unit's case (supra)* in which the Court stated that:
"The Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30(2) 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."

36. Counsel also submitted that the "Applicant cannot afford himself the Argument to the effect that the detention arising out of the decision of the Tribunal of First Instance is equally unlawful and as such a continuing violation; and that, in this case, computation of the time can only commence after the cessation of the continuing detention. Continuing violation are not exempted from Article 30(2) of the Treaty because such an argument militates against the spirit and grain of the principle of legal certainty as was observed by the EACJ Appellate Division in *Omar Awadh's case*."
Counsel for the 1st Respondent did not make submissions on this issue.

**Decision of the court**

37. As the case stands, the main thrust of the Applicant's Counsel's argument is that, firstly, the failure by the Respondent to present the Applicant before the competent court within the prescribed time is unlawful and thus, an infringement of Article 6(d) and 7(1) of the Treaty. Secondly, since the preventive detention has never been confirmed as required by the Burundian law, there is continuing illegal and unlawful detention notwithstanding subsequent condemnations of the Applicant to life imprisonment and therefore, Article 30(2) of the Treaty as regards the computation of the time to institute proceedings cannot apply.
38. In agreement with Counsel for the 2nd Respondent's position as supported by the authorities cited above, we are of the decided view that Counsel for the Applicant's argument revolving around the notion of a continuing violation of the Applicant's rights does not stand at all. Since the impugned irregularities surrounding the Applicant's detention triggering his claim were well known as by 15th June 2011, no reason was given why the time to file the Reference was not complied with as prescribed by Article 30(2) of the Treaty.
39. In a similar case, the Appellate Division of this Court has rejected the concept of legal continuing violations and opted instead for a strict interpretation of Article 30(2) of the Treaty in order to protect the principle of legal certainty. It has so decided 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 (including for 'continuing violations)". [See *Omar Owadh's case (supra), p. 21*].
40. In view of all the foregoing, we conclude that the Applicant filed his Reference out of the prescribed time, and that, consequently, the Reference is time-barred for not complying with the provisions of Article 30(2) of the Treaty. We answer this issue in the affirmative.
41. Since the issue is answered in the affirmative, accordingly, we refrain from entertaining the remaining issues for the simple reason that the Reference is no longer alive.
42. Consequently, the Reference is dismissed.
43. As for costs, given the peculiar circumstances of this Reference, it would not serve the ends of justice to condemn the Applicant in costs. We accordingly deem it just that each party shall bear its/his own costs.

**Conclusion**

44. The Reference is dismissed.
45. Each party shall bear its/his own costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 5 of 2012

**Abdu Katuntu (Shadow Attorney General for the opposition in the Parliament of Uganda)**

**And**

**The Attorney General of Uganda, The Secretary General East African Community**

**And**

**Hon. Margaret Nantongo Zziwa, Hon. Dora Byamukama, Hon. Benard Mulengani, Hon. Dan Kidega, Hon. Mike Sebalu , Hon. NusurA Tiperu, Hon. Susan Nakawuki, Hon. Chris Opoka and Hon. Mukasa Fred Mbidde - Interveners**

Jean Bosco Butasi, PJ; M.S. Arach-Amoko, DPJ; J. J Mkwawa, J; Isaac Lenaola, J, F. Ntezilyayo, J
November 25, 2013

*Election of Members of the East African Legislative Assembly - Amendment of Pleadings- Participation of political parties in the elections- Whether the amended Reference conformed with the Court's rules - Whether the Parliament of Uganda exercised its power of election under the Treaty.*

*Articles 4(3); 9(1) (f), 23(1),27(1),29(1),30(1),38(1),50 (1) of the Treaty for the Establishment of the East African Community - Rules 24(1), 48 (b) of the East Court of Justice Rules of Procedure ,2010.*

The Applicant was an elected Member of the Parliament of Uganda and Shadow Attorney General in the Parliament of Uganda. During parliamentary debate on fresh rules for the election of members of the East African Legislative Assembly, in 2012, an issue arose as to whether all the six political parties represented in the Parliament of Uganda should send a member each to the EALA in adherence to Article 50(1) of the Treaty. The ruling political party, The National Resistance Movement, argued that not all the six political parties would be represented while the opposition, wanted all the six political parties to be represented. In order to resolve the disagreement, Parliament passed a Resolution that the Attorney General should refer the matter to the East African Court of Justice for interpretation of Article 50(1) of the Treaty. However, the matter was not referred to this Court and Parliament went ahead to enact the impugned Rules, hence this Reference.

On the 18th May 2012, the Parliament of Uganda passed the Rules of Procedure for the election of the Members to the EALA.

The Applicant filed this Reference on claiming that the new Rules of Procedure were not in conformity with Article 50 of the Treaty.

**Held:**

1) The Court had jurisdiction relating to election of the EALA members only where it required interpretation of the Treaty
2) The Applicant violated Rule 48(b) of the Rules of Procedure and the 2nd Respondent was wrongly enjoined to the proceedings.
3) Rule 13 (1) of the Appendix B of the Rules of Procedure for the election of the Members to the EALA spelt out the procedure for election of Uganda's Representatives to the EALA mirroring the wording of Article 50 of the Treaty. Thus the process and procedure for nomination, campaigns and subsequent election, guaranteed the participation of any interested person.
4) Each political party had a chance to nominate candidates to stand for election on the Election Day for members to the EALA and the very nature of an election meant that no candidate was assured of election merely because they were supported by a particular political party. The meaning and import of Article 50 (1) of the Treaty did not require that all the six political parties should be represented in the EALA. The Reference was therefore dismissed.

**Cases cited:**

Democratic Party and Mukasa Mbidde v, The Secretary General of the East African Community & Another, EACJ Reference No. 6 of 2011

Hon. Jacob Oulanyah v.The Attorney General of The Republic of Uganda, Constitutional Petition No. 28 of 2006

Mtikila v.Secretary General of the East African Community and Others, EACJ Reference No. 2 of 2007 (distinguished)

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

**Judgment**

**Introduction**

1. This is a Reference by one Abdu Katuntu (hereinafter referred to as the "Applicant"). The Applicant is an elected Member of the Parliament of Uganda. He is also the Shadow Attorney General in the Parliament of Uganda.
2. The instant Reference was filed on May 28, 2012 and amended on June 22, 2012 to implead the Secretary General of the East African Community (hereinafter referred to as the "Second Respondent"). The Reference was filed under Articles 4(3); 9(1)(f); 23(1); 27(1); 29(1); 30(1); 38(1); 50 (1) of the Treaty for the Establishment of the East African Community and Rule 24(1) of the East Court of Justice Rules of Procedure (hereinafter referred to as " the Treaty" and " the Rules", respectively).
3. The Reference is supported by the affidavit of the Applicant himself sworn on June 20, 2012, that of Kenneth Paul Kakande sworn on August 29, 2012 and Hon. John Ken Lukyamuzi dated September 3, 2012.

4. The 1st and 2nd Respondents are the Attorney General of the Republic of Uganda and the Secretary General of the East African Community respectively. In opposition to the Reference, is the Response and the replying affidavits sworn on behalf of the 1st Respondent by Mrs. Jane Lubowa Kibirige, the Clerk to the Parliament of Uganda and Hon. Peter Nyombi, the Attorney General of the Republic of Uganda. The 2nd Respondent on his part, in opposition to the Reference, relies on his Response which was filed on August 13, 2012.
5. It is also imperative to mention that on August 15, 2012, nine Interveners, namely, the Uganda Representatives to the East African Legislative Assembly (hereinafter referred to as the " EALA" ), filed a Notice of Motion under Article 40 of the Treaty and Rule 36 (1) (d) of the Rules . This Court granted their Application on February 5, 2013. The Court also allowed the Interveners' supporting affidavit deponed by one Hon. Margaret Nantongo Zziwa (the 1st Intervener) to serve as the statement of intervention as provided under Rule 36(4) of the Rules. Further to the foregoing, the Interveners were allowed to make submissions.

**Representation**

6. Mr. Ladislaus Rwakafuuzi represented the Applicant while Ms. Robina Rwakoojo, Mr. Philip Mwaka, Mr. Elisha Bafirawala, Ms. Maureen Ejang and Ms. Eva Kavundu appeared for the 1st Respondent. Mr. Wilbert Kaahwa, learned Counsel to the Community appeared for the 2nd Respondent whereas Mr. Justin Semuyaba appeared for the Interveners.

**Background**

7. It can be gleaned from the Applicant's pleadings that this Reference is predicated on conformity to Article 50 (1) of the Treaty which provides that: "50(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 it 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."
8. Pursuant to the above Article, in 2006, the Parliament of the Republic of Uganda passed the Rules of Procedure for the election of members of the EALA. The Constitutional Court of Uganda in *Hon. Jacob Oulanyah vs The Attorney General of The Republic of Uganda, Constitutional Petition No. 28 of 2006*, subsequently annulled the Rules on the ground, *inter alia*, that they were contrary to Article 50(1) of the Treaty and that Parliament had divested itself of its duty to elect Members of the EALA and bestowed it on the political parties.
   Since the said Rules were invalidated, it became necessary to make fresh rules for the election of members of the EALA for the 2012 elections.
9. During the debate, an issue arose as to whether all the six political parties represented in the Parliament of Uganda should send a member each to the EALA in adherence to Article 50(1) of the Treaty. The National Resistance Movement (NRM), which is the ruling political party, argued that not all the six political parties would be represented. The opposition, on the other hand, wanted all the six political parties to

be represented. In order to resolve the disagreement, Parliament passed a Resolution that the Attorney General refers the matter to this Court for interpretation of Article 50(1) of the Treaty to enable Parliament to make amendments which are in conformity with the said Article.

10. It is apparent that the matter was not referred to this Court but Parliament went on to make the impugned Rules, hence this Reference.

**The Applicant's Case**

11. The Applicant's case is contained in the Amended Reference filed on June 22, 2012, the affidavit sworn by himself on June 20, 2012, the affidavit of Kenneth Paul Kakande sworn on August 29, 2012 and that of Hon. John Ken Lukyamuzi sworn on September 3, 2012, as well as his submissions.
12. In summary, the Applicant's case is as follows: Firstly, that the impugned Rules did not guarantee that all the six political parties represented in Parliament of Uganda would send representatives to the EALA.
    Secondly, that the Rules further failed to guarantee that it shall be Parliament that shall elect members to the EALA.
    Thirdly, that the Rules also failed to provide that the nominated candidates shall be gazetted. Subsequently, the NRM presented six persons to Parliament for election; the Democartic Party (DP) and the Uganda Peoples' Congress (UPC) both presented one candidate each for nomination and Parliament approved these candidates.
13. Consequently, the purported elections held on May 18, 2012 were not in accordance with Article 50 of the Treaty.
14. Fourthly, that the 2nd Respondent failed in his duty under the Treaty to stop the elections conducted by the Parliament of Uganda and the consequent swearing in of the nine elected EALA members on June 6, 2012.
15. It is on the basis of the foregoing that the Applicant sought the following declaratory orders:
    " (a) A declaration that all the six political parties represented in the Parliament of the Republic of Uganda may each send a member to the East African Legislative Assembly.
    (b) A declaration that the purported elections in the Parliament of the Republic of Uganda that took place on 30th May 2012 for the members of the East African Legislative Assembly are null and void.
    (c) A declaration that the Secretary General of the East African Community the 2nd Respondent herein failed in his duties under the Treaty when he refused to stop the swearing in of the Members of the East African Legislative Assembly from Uganda.
    (d) A declaration that Rule 13 (1) and (2) of the Rules of Procedure for the election of members of the East African Legislative Assembly adopted by the Parliament of Uganda is contrary to Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.
    (e) An order that the elections of 6 members to the East African Legislative Assembly by and from the National Resistance Movement one of the 6 political parties having Members of Parliament in the Parliament of Uganda be set aside.
    (f) An order that fresh rules of procedure for the election of members of the East

African Legislative Assembly by the Parliament of Uganda be made providing that all the political parties having members in the Parliament of Uganda be represented by at least one member in the East African Legislative Assembly.

(g) An order that fresh elections be conducted by the Parliament of Uganda for the Members of the East African Legislative Assembly.

(h) Any other relief.

(i) An order awarding the costs of this reference to the applicant."

16. At this juncture, it is instructive to note, that on September 12, 2013, when the matter came up for hearing, Counsel for the Applicant abandoned prayers (b), (c) and (e).

**Case for the 1st Respondent**

17. The 1st Respondent's case rests on a response to the amended Reference filed on July 26, 2012 which was supported by an affidavit of Mrs. Jane Lubowa Kibirige, the Clerk to Parliament of Uganda together with that of Hon. Peter Nyombi , the Attorney General of the Republic of Uganda and submissions.

18. In a nutshell, the 1st Respondent's case is as follows:-

(a) That the Parliament of the Republic of Uganda amended and adopted Rules of Procedure for the election of Uganda's Representatives to the EALA, particularly Rules 13(1) and (2) and Appendix B.

(b) The 1st Respondent contended that the 2012 Rules of Procedure are in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.

(c) The Rules enabled the various Political Parties represented in Parliament, shades of opinion, gender and other special interest groups to nominate any number of candidates to participate in the elections to the EALA and seventeen persons were nominated.

(d) That Rule 13(1) of Appendix B of the Rules of Procedure for the Election of the said members to the EALA permitted the various political parties represented in Parliament, shades of opinion, gender and other special interest groups to nominate candidates for elections to EALA.

(e) That pursuant to the Rules 13(1) of Appendix Appendix B, the NRM, DP, CP, UPC and the Independents all nominated candidates to contest for the elections to the EALA.

(f) That FDC and JEEMA opted not to nominate or otherwise participate in election process.

(g) That Rule 13(1) Appendix B of the Rules of Procedure for the Election of EALA members does not impose any restriction on the number of nominees to be forwarded by the various political parties, shades of opinion, gender and other special interest groups for election.

(h) That FDC having picked 20 nomination forms for purposes of nominating candidates to contest for the EALA elections, returned one Louis Dramadri as the duly nominated candidate for FDC.

(i) A total of seventeen nominees were forwarded to Parliament to contest for the nine slots reserved for Uganda to the EALA.

(j) The 1st Respondent contended that the said EALA elections were conducted by secret ballot and in conformity with Articles 23(1),27(2),38(1) and 50(1) of the Treaty.

(k) In the alternative, but without prejudice to the foregoing, the 1st Respondent averred that non conformity with any procedural Rules was not fatal or substantial to the adoption/passing of the said Rules or conduct of the said elections.

On the basis of the foregoing, the 1st Respondent prays that the Reference be dismissed with costs.

**Case for the 2nd Respondent**

19. The 2nd Respondent filed his Response on August 13, 2012 and his submissions on April 8, 2013 and his case is as follows:-
    (a) That the matters contained in the Applicant's case are, pursuant to Article 52 of the Treaty, tantamount to questions of an election of representatives of a Partner State to the EALA, which must be determined by an institution of the Republic of Uganda that determines questions of the elections of members of the National Assembly.
    (b) That the Reference does not allege any wrong doing on his part and therefore there is no cause of action against him and that the Reference is wrongly and unprocedurally filed against him.
    (c) That the recognition of elected Members of the EALA is a function of the law under the Treaty and the Rules of Procedure for Election of Members of the EALA and does not rest with him at all.
    (d) That on the basis of that law, the 2nd Respondent is bound to take cognizance of the election of Members of EALA as duly communicated to him and he could not in the circumstances, have halted the swearing in of members of the EALA.

    It is also the 2nd Respondent's case that the granting of orders sought would unduly interfere with the smooth operations of the East African Community and he prays that the Reference be dismissed with costs.

**The Interveners' Case**

20. The Interveners' case, briefly, is as follows:
    (a) That the process of enacting the Rules of procedure for the election of the representatives of Uganda to the EALA followed the established legal mandate of the Parliament of Uganda and the adopted procedure, particularly Rule 13(1) and (2) of Appendix B was consistent with and not in contravention of the provisions of Article 50(1) of the Treaty.
    (b) That the impugned 2012 Rules comply with Article 50 of the Treaty as they cater for all the categories of persons required and provided for by the procedure of election of the EALA representatives and the Interveners were properly elected out the process.
    (c) That the Rules allowed all the various political parties represented in Parliament to nominate any number of candidates to participate in the EALA elections.
    (d) That the Rules no longer use the phrases "numerical strength" as they previously did.
    (e) That the Interveners represent all the categories stipulated in Article 50 of the Treaty, namely, the various political parties represented in the Parliament of Uganda, shades of opinion, gender and other special interest groups.

**Scheduling Conference**

21. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on February 6, 2013 at which the following were framed as the points of agreement and disagreement respectively:
    (i) Points of agreement:
        (a) The Parliament of Uganda passed Rules of Procedure for the election of Members of the East African Legislative Assembly on the 18th May 2012.
        (b) The Reference raises triable issues meriting adjudication and pronouncement by this Court.
    (ii) Points of disagreement/issues for determination of court
        1) Whether the Court is vested with jurisdiction to entertain issues relating to the election of members to the EALA.
        2) Whether the Applicant has locus standi to institute this Reference.
        3) Whether the amended Reference is in conformity with the Rules of Procedure of this Honourable Court.
        4) Whether the Parliament of Uganda exercised its power of election under Article 50(1) of the Treaty.
        5) Whether the meaning and import of Article 50 (1) of the Treaty requires that all the six political parties be represented in the EALA.
        6) Whether the 2nd Respondent is legally bound to halt the swearing of the elected members of the EALA.
        7) Whether the parties are entitled to the remedies sought.
        8) It was further agreed at the said Conference that evidence would be by way of affidavits.
        9) The Parties also agreed to file written submissions in respect of which they would make oral highlights at the hearing.
        10) All the Parties noted that there was no possibility of mediation, conciliation or settlement.

**Counsels' Submissions and Determination of the Issues**

Issue No. 1:- Whether the Court is vested with the jurisdiction to entertain issues relating to the election of the members of EALA

22. From the outset, Mr. Rwakafuuzi, prayed that this issue should be rephrased to reflect the Applicant's pleadings and to read as follows:
    "Whether the Court is vested with jurisdiction to entertain this Reference."
23. It is his argument that the 1st Respondent had refused to do what the Speaker of Parliament in Uganda had asked him to do, that is, refer the issue to this Court for interpretation. That the Applicant in this Reference is now seeking the Court's interpretation of the meaning of 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 it is feasible, the various political parties represented in the National Assembly…"
24. It is Counsel's contention that building on the foregoing, the proper issue to be answered is whether this Court has jurisdiction to entertain the Reference that seeks the interpretation by the Court as to whether all the political parties represented in

the Parliament of Uganda should be guaranteed representation in the EALA by the Rules of Procedure for Election of Members to the EALA.

25. Mr. Rwakafuuzi argued that in *Professor Peter Anyang' Nyong'o & Others vs The Attorney General of Kenya – EACJ Reference No. 1 of 2006*, this Court held that the Court had the power to interpret whether the rules made for the election of members to the EALA were in conformity with the Treaty. It is his stance that the instant Reference seeks an answer to that same question.
26. Counsel contended further that the present Reference is distinguishable from that of *Christopher Mtikila vs Secretary General of the East African Community and Others – EACJ Ref. No. 2 of 2007*, which sought merely to challenge elections of members of EALA by the Tanzanian Parliament.
    It is on the basis of the foregoing that the Learned Counsel invited this Court to answer the issue in the affirmative.
27. Ms. Robinah Rwakoojo, disagreed for the following reasons:
    This Court's jurisdiction is confined, under Article 27 (1), to interpretation and application of the Treaty and excludes specific matters which are a preserve of the Institutions of National Partner States.
28. In the instant Reference, the Applicant, as is clear from his prayers, namely, paragraphs (b), (c), (f) and (g), is inviting this Court to enquire into and make declarations on the validity of the election of all the nine elected Representatives of Uganda to the EALA (the 9 Interveners).
29. It is Counsel's argument that any question regarding the validity of any members' election to the EALA, was explicitly the sole preserve of the institutions of the Partner State that determine questions of election of members of the National Assembly responsible for the election in question as provided by Article 52(1) of the Treaty.
30. It is Counsel's stance, that on the basis of the foregoing, the Applicant is improperly before this Court. In support of her proposition the Counsel relied on the provisions of Article 52 of the Treaty and also on the decisions and pronouncements in the following cases: *EACJ Ref. No. 2 of 2007 Christopher Mtikila vs. The Attorney General of the United Republic of Tanzania and Another, and EACJ Ref. No 1 of 2010 Hon. Sitenda Sebalu vs. Secretary General of the East African Community and 3 Others*.
    In the premise, the Counsel urged us to answer Issue No. 1 in the negative.
31. Mr. Kaahwa, in essence, associated himself with the submissions of his colleague representing the 1st Respondent.
    He was, however, emphatic that what is before us is not a Reference within the normal parameters of Articles 27 and 30 of the Treaty. He contended that what is before this Court is actually a petition in disguise, which should have been handled in accordance with the provisions of Article 52 of the Treaty which provides that: -
    "1. 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 numbers of the National Assembly responsible for the election in question.
    2. The National Assembly of the Partner States shall notify the Speaker of the Assembly of every determination made under paragraph 1 of this Article."
32. On the basis of the aforementioned, Mr. Kaahwa submitted that in effect, in cases

where the matters allegedly fall within the ambit of Article 52, as it is the case in the instant matter, then this Court ought to divest itself of jurisdiction as it did the *Mtikila case (supra)*.

It is the Counsel's further argument that in light of the aforesaid, the proper course of action for the Applicant would therefore, have been to petition the High Court of Uganda under Article 86(1), (2) and (3) of the Constitution of the Republic of Uganda as amended and Section 86 of the Parliamentary Elections Act, 2005 for that court to make a finding on the question of membership to the EALA, raised in the instant Reference.

33. It was Mr. Kaahwa's prayer, therefore, that as this Court is not vested with the jurisdiction to entertain issues relating to the election of Members to the EALA, issue No. 1 should be answered in the negative.
34. Mr. Semuyaba on his part, associated himself with the submissions of Counsel for the 1st and 2nd Respondents, and we do not find it necessary to regurgitate those submissions.

    Mr. Semuyaba, however, urged this Court to take note of the fact that after the decision in the Prof. Anyang' Nyongo's case (supra) , Article 27 of the Treaty was amended. The said amendment in August 2007 introduced a proviso which reads:-

    "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."
35. It is Mr. Semuyaba's argument in that regard that the import of this proviso is that, after 2007, this Court cannot go into matters of interpretation reserved for the institutions of the Partner States.
36. He further contended that whoever is dissatisfied with the result of an election to the EALA, ought to move under Article 52 of the Treaty, therefore, this Court cannot entertain the instant Reference which aims at nullifying the elections to the EALA as it has no such jurisdiction under Article 52 of the Treaty.

**Decision of the Court on Issue No. 1**

37. From the outset, we find it pertinent to point out that the Applicant's Counsel who is now requesting the Court to rephrase this issue had fully participated in the Scheduling Conference where both parties ascertained the points of agreement and the issues for determination by the Court, after which the Court had directed the parties to correct clerical mistakes, sign and file a joint Scheduling Memorandum. That directive was complied with by all the parties.
38. It is common knowledge that the rationale for scheduling is to agree and narrow down the issues for resolution by the Court. This is provided for under the Rule 53 of the Court's Rules. For that reason, and in fact in the absence of good cause, the Applicant cannot be heard to say that during the Scheduling Conference, the issue thus framed did not arise from his pleadings.
39. We accordingly, with great respect to Mr. Rwakafuuzi's, decline his invitation and elect to proceed with the issue in question as framed, agreed and signed on September 12, 2013 when we sat for the Scheduling Conference.
40. Having therefore considered the rival arguments of the parties in support of their

respective positions on this issue , we opine as hereunder:

Firstly, that this Court derives its jurisdiction from the Treaty, which prescribes the role of the Court under Article 23 (1) as, follows:

"(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."

41. Further, a closely related but distinct provision is Article 27 (1) of the Treaty, which states as follows regarding the jurisdiction of the Court:

"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".

42. The Treaty, and of importance to the present Reference, also provides in Article 30 (1) and (3) that:

" (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 or action is unlawful or is an infringement of the provisions of this Treaty.

(2) …

(3) 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."

43. It is amply clear from the pleadings and the prayers sought, that in the instant case, unlike the *Mtikila's case (supra)*, annulment of the election to the EALA is not the substratum of the Reference. The Applicant is seeking orders and reliefs, which, in essence, are pegged on the interpretation and application of Article 50(1) of the Treaty, which is proper and within the mandate of the Court under Article 27(1) of the Treaty.

On this score alone, we find and hold that the instant Reference, as rightly submitted by Mr. Rwakafuuzi, is distinguishable from the *Mtikila case (supra)*.

44. Secondly, we are also alive to the fact that the Applicant's original Reference was filed on May 28, 2012, namely, two days before the election of the Members to the EALA in Uganda. This being the state of affairs, by any stretch of imagination, the Applicant's Reference cannot be said to be about the elections as stipulated in Article 52 of the Treaty.

45. On that score, we are again in agreement with Counsel for the Applicant that the gravamen of his complaint was in respect of the Rules enacted prior to May 30, 2012 and not the result of the election per se.

However, we are unable to close our eyes to the fact that in the Amended Reference lodged on June 22, 2012, there are prayers sought which do not fall within the ambit of Article 50(1) of the Treaty. It is our candid view in that regard that those pleadings and the declarations sought fall squarely within the ambit of Article 30 of the Treaty. Hence the abandonment of prayers (b), (c) and (e) of the Reference by the Applicant.

46. We are fortified in this view by the decision of our predecessors in *Prof. Peter Anyang*'

*Nyongo's (supra)* where this Court found that some declarations sought fell within the ambit of Article 52 (1) of the Treaty and refused to entertain that aspect of the issue but dealt with the aspect of the case that fell squarely within the ambit of Article 50(1) of the Treaty and gave the declarations accordingly.

47. Thirdly, we find and hold that the instant Reference when properly examined, specifically prayers (a), (d), (f) and (g), raise issues for interpretation under Articles 27(1) and 50(1) of the Treaty.
For the reasons we have given, our answer to issue No.1 is that the Court has jurisdiction relating to election of the EALA members only where it requires interpretation of the Treaty.
Issue No. 2:-Whether the Applicant has locus standi to institute this Reference.

**Submissions:**

48. It has been submitted by Mr. Rwakafuuzi as follows:-
That the Applicant is the Shadow Attorney General for the Opposition in the Parliament of Uganda. Therefore, he has locus under Article 30 (1) of the Treaty to access this Court. In that regard, he is seeking the interpretation of the Treaty in relation to the dispute that has arisen in Parliament as to the proper interpretation of the Treaty in the making rules for the election of the members to the EALA.
49. In *Plaxeda Rugumba vs. The Attorney General of Rwanda – EACJ Ref. No. 8 of 2010* the same issue arose and this Court held that any resident in the East African Community has access to this Court by virtue of Article 30 (1) of the Treaty to seek the Court's interpretation of the Treaty when a dispute has arisen.
In the premise, Counsel prayed that this issue be answered in the affirmative.
Counsel for the 1st Respondent declined to make any submissions on this issue.
50. Although Mr. Kaahwa, made elaborate submissions, in the end, he did not contest the issue.
Mr. Semuyaba, in his submissions went more into the merits of the case, and not locus standi. Nothing substantive thereof came out of his submission on this issue. His argument was that there is all evidence that the Applicant as a Member of the Parliament and Shadow Attorney General for the Opposition participated in the making of the Rules in 2012. The Counsel submitted further that the Applicant being a Member of Parliament is not eligible for election.
He concluded by saying that in the light of the foregoing, the Applicant's Reference is, therefore, superfluous.

**Decision of the Court on Issue No. 2**

51. This issue was a non-issue and therefore we are in full agreement with Counsel for the Applicant that the Applicant has locus standi to bring this Reference under Article 30 of the Treaty.
Accordingly, we answer Issue No. 2 in the affirmative.
Issue No. 3- Whether the Amended Reference is in conformity with the Rules of Procedure of this Honourable Court.
52. Counsel for the 1st Respondent had the following to say on this issue:
That on May 28, 2012, the Applicant filed this Reference against the 1st Respondent

only. On June 22, 2012, the Applicant filed an Amended Reference in which, among others, he added the Secretary General of the East African Community as the 2nd Respondent.

53. It is the Counsel's submission that, in filing the Amended Reference, the Applicant did not comply with Rule 48 (b) of the Rules, in that he did not seek the requisite consent from the party to be added as required by that Rule. The Rule requires: "… the consent of all parties, and where a person is to be added or substituted as a party, that person's consent."
    The Counsel concluded by saying that the failure to seek the consent of the other parties is a procedural illegality to which the Court cannot close its eye.
54. Mr. Kaahwa went even further in his submission on this issue and had the following to say:
    Firstly, that the Amended Reference does not state under what rules the Amended Reference was lodged. It merely states "r 24(1)" without any particular set of Rules. The only law being referred to is the Treaty, which equally does not have any rules or regulations attached thereto.
55. Counsel further submitted that even if he is to assume that Rule 24(1) of the Rules of this Court is being referred to by the Applicant, it is his contention that it does not apply to the lodging of the Amended Reference. Rule 24(1) of the said Rules provides that:
56. "A reference by a Partner State, the Secretary General or any other person under Articles 28, 29 and 30 respectively shall be instituted by presenting to the Court an application."
57. Counsel further argued that according to Rule 12(1) of the Rules:
    "a party entitled or given leave to amend a pleading may amend the original document itself or lodge an amended version of the document."
58. Rule 12 (2) provides that such amendment may be by striking through the words or "figures to be deleted in red while they remain legible and/or writing the words or figures to be added in red".
59. Counsel, invited us to note that in this Reference, the amendments are merely highlighted in pink and the words added are not in red as required by the above Rule. It is the Counsel's argument that what the Applicant did, is tantamount to a procedural anomaly and that courts of law do not accede to such procedural anomalies and mishaps.
60. Secondly, it is Counsel's submission that the manner in which the 2nd Respondent was added to this Reference by way of Amended Reference was irregular and incredibly out of consonance with the Rules. It is Mr. Kaahwa's contention, that the Applicant was obliged under Rule 48(b) of the Rules to seek the prior consent of the 2nd Respondent. The said rule provides that:
    "(48) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in the pleading, a party may amend its pleading: without leave of the Court, before the close of pleadings;with the consent of all parties, and where a person is to be added or substituted as a party, that person's consent; or with leave of the Court."
    It is Counsel's submission that it is glaringly clear that in the instant matter the

Applicant did not comply with the Rule in question. In conclusion, Mr. Kaahwa, urged this Court to suo motu resolve in his favour and dismiss the Reference with costs on this score alone.

61. Mr. Semuyaba, associated himself with the arguments of Counsel for 1st and 2nd Respondents, specifically on the requirements of Rule 48 (b) of the Rules. Further to the foregoing, he invited this Court to follow the footprints of the courts in the following cases, namely, *Nambi v Bunyoro General Merchants (1979) HCB, African Overseas Trading Co. vs Achorya (1963) EA 468, Hogod Jack Simonian v Johar (1962) E.A 336 and Fernandes Kara Arjan & Sons 1961 E.A.693*, where those courts upon being faced with a similar situation struck out the pleadings. He also prayed that the amended pleadings be struck out with costs.
62. Mr Rwakafuuzi was very brief on this issue. He submitted that the issue was raised by Counsel for the 1st Respondent, yet the amendment did not affect the validity of the pleadings raised against the 1st Respondent. That as the amendment did not affect the validity of the pleadings raised against the 1st respondent, his complaint is baseless, to say the least. That as the Secretary General did not complain that he had been joined in the Reference without leave of Court or his consent, therefore, the Applicant deserves to be granted the declarations sought in the Reference excepting prayer "c" thereof.

**Decision of the Court on Issue No. 3**

63. This issue rotates around the applicability of Rule 48(b) of the Rules which is reproduced elsewhere above, therefore we shall not spend time on it because it is obvious that the Rule was violated by the Applicant ,who has in any event, not denied such violation. In that event, we agree with the submissions by Counsel for the Respondents and the Interveners and following the authorities set out above, the only option available to the Court, is to strike out the Reference against the 2nd Respondent who was wrongly enjoined to the proceedings.
    The answer to the issue is thus in the negative.
    Issue No. 4- Whether the Parliament of Uganda exercised its power of election under Article 50 (1) of the Treaty.
64. Mr. Rwakafuuzi forcefully argued that there were no valid elections envisaged under Article 50 (1) of the Treaty because:
    Firstly, there were no valid rules to guide the election. It is his argument that the impugned Rules do not live to the expectation of Article 50 (1) of the Treaty as they do not do the following:
    i. they do not spell out that all the six political parties represented in Parliament shall be represented in the EALA.
    ii. they do not go on specify what the political parties represented in Parliament are although the Rules talk of "the various political parties and organizations represented in Parliament" (see Rule 13 (1) of the impugned Rules.)
    iii. they do not say whether all parties or which of them will be represented in Parliament, and the standard of qualification of any such party to have a member or members selected for the EALA.
    iv. they do not elaborate what they actually mean by "shades of opinion". It is

Counsel's contention that "shade" of opinion should have been mentioned in the Rules, so that the "shade" of opinion is either agreed unanimously or arrived at by majority vote. In other words, the "shades" of opinion must be mentioned specifically in the Rules.

v. though the Rules go on to include "gender", they do not say how the 'gender' shall feature.

vi. though the Rules talk of "…and other special groups…", they do not say what special interested groups were to be represented, how they were to be identified or how were they to be nominated.

vii. they did not spell out how the independent candidates would be identified.

65. It is, therefore, his main argument that what were called "Rules" could not guide the conduct of Parliament in the purported elections of the EALA. It is his contention that the said Rules were not merely permissive but were so vague and allowed whimsical and arbitrary conduct, not envisaged under Article 50 of the Treaty.

66. Secondly, that the Parliament of Uganda did not exercise the power of election bestowed upon it under Article 50(1) of the Treaty and that since there were no Rules to guide Parliament with regard to each political party's stake, it can only be concluded that the NRM political party assumed the role of Parliament and purported to elect the six nominees who were then wholesale approved by Parliament without election.

67. It is Counsel's argument that the Parliament had divested itself of its obligation under Article 50(1) of the Treaty and bestowed it on the political parties, in particular the NRM political party that assumed the role of Parliament. According to the Counsel, this scenario is the same as in the *Hon. Oulanyah case(supra)*.

68. Thirdly, Mr. Rwakafuuzi decried the non-gazettement of the Rules. He contended that lack of gazettement continues to show that the Rules were not meant to guide objective conduct of the members in electing members of the EALA. Since the persons to be elected were outside Parliament, it was necessary to give qualified persons notice in the gazette of the existence of those Rules.
Based on the foregoing, Counsel prayed that this issue be answered in the negative.

69. Counsel for the 1st Respondent in answering this issue submitted as follows:
Firstly, that the impugned Rules were enacted on May 18, 2012 whereupon, and it is amply evident from the copies of the Official Hansard Report for May 18, 2012 at page 114 paragraph 10 to 129, that all political parties represented in Parliament were involved in the process.

70. Secondly, Counsel argued that Rule 13(1) which specifically deals with the election procedure mirrors the wording of Article 50(1) of the Treaty as it now reads as follows:
"(1) The election of members to the Assembly representing the various political parties and organizations represented in Parliament, shades of opinion, gender and other special interest groups in Uganda shall be conducted after consultation and consensus by the political parties and other members of Parliament."

71. It is the Counsel's argument that the Rules allow for open nominations and open up the election process without limitation to the number of nominees from the political parties represented in the Parliament of Uganda and independent candidates. That they also cater for gender, shades of opinion and other special interest groups in total compliance with Article 50 of the Treaty.

72. Thirdly, Counsel submitted that, on May 30, 2012, the seventeen duly nominated and vetted candidates openly campaigned in Parliament and nine of them were subsequently elected in a free and fair election, as Uganda's representatives to the EALA.
73. It is Counsel's contention that what transpired on May 30, 2012 for all intents and purposes was an election to choose or select through a process of voting as was determined by the National Assembly of the Republic of Uganda, in total compliance with Article 50(1) of the Treaty.
74. Fourthly, Counsel asserted that the elected nine members were from outside the Parliament of Uganda's in compliance with Article 50(1) of the Treaty.
    It is based on the foregoing that the learned Counsel invites this Court to answer Issue 4 in the affirmative.
    Mr. Kaahwa, did not submit on this issue.
75. Mr. Semuyaba learned Counsel for the Interveners, made very lengthy submissions while answering this Issue. We will, however, give a summary of his submission, which is as follows:-
    Firstly, that the election of the Members to the EALA, which is now a subject matter in this Reference, was undertaken by the Parliament of Uganda as provided for by the Election Rules within the meaning of Article 50 of the Treaty.
76. Secondly, that although Article 50 of the Treaty provides for the National Assembly of each Partner State to elect nine members, 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 possible, they should represent specified groupings.
77. It is the Counsel's contention that it is expressly left to the National Assembly of each Partner State to determine its procedure for the election. According to the Counsel, this is in recognition of the fact that each Partner State has its peculiar circumstances to take into account in doing so.
78. Thirdly, He argued that the power and discretion of the National Assembly under Article 50(1) is so unfettered that the National Assembly may determine the procedure of election in exercise of that power and discretion. Counsel contended further, that the aforegoing was approved by this Court in the *Prof. Anyang' Nyongo (supra)*.
79. Fourthly, he asserted that Article 50 of the Treaty constitutes the National Assembly of each Partner State into "an Electoral College" for electing the Partner States' nine representatives to the Assembly.
80. Fifthly, he argued that the Hansard of the Parliament of Uganda shows that a nomination process was conducted and an election was conducted as is required by Article 50 of the Treaty.
81. It is the Counsel's contention that 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. Counsel was, however, of the view that in the context of Article 50, the words "election" and "to elect" relate to the National Assembly choosing or selecting persons to hold political positions and that it has been left to each National Assembly to adopt its preferred meaning of the words through the rules of procedure it determines. (See *Prof. Peter*

*Anyang' Nyongo's case supra*).
In conclusion, the 1st Respondent and the Interveners pray that this issue be answered in the affirmative.

**Decision of the Court on Issue No. 4**

82. We have considered the submissions of all the learned Counsel and taken into consideration the pleadings and evidence on record.
It is not in dispute that following a lengthy debate, the Parliament of Uganda, on May 18, 2012 passed the Rules of Procedure for the election of the Members to the EALA. We are also in agreement with the learned Counsel for the 1st Respondent that Rule 13 which specifically deals with the election procedure "mirrors" the wording of Article 50 of the Treaty.
83. It is palpably clear to us, and we have no doubt in our minds, that the impugned Rule 13 (1) of the Appendix B spelt out vividly the procedure for election of Uganda's Representatives to the EALA. The said Rule has been reproduced elsewhere in this judgment.
84. From the above, it is abundantly clear that the Rule spelt out that the various political parties represented in Parliament, shades of opinion, gender and other special interest groups, who wished to contest for the EALA, were free to do so.

The process and procedure for nomination, campaigns and subsequent election, in any event, guaranteed the participation of any interested person and we have seen no evidence to the contrary.

85. In the instant Reference, the Applicant wants this Court to determine whether the Parliament of Uganda exercised its power of election under Article 50(1) of the Treaty and in doing so, we shall walk in the footprints of our predecessors in the now famous case of *Prof. Anyang' Nyongo' (supra)* and opine as follows:
86. One, that in the Prof. Anyang Nyongo's case, the claimant maintained 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 in all the Partner States, and also in international democratic practice worldwide. Under the constitutional and electoral laws of Kenya that govern the elections of the President, and of Speaker, Deputy Speaker and Members of Parliament, the Court at pg. 31 of the Prof. Anyang Nyongo's case, held as follows:
87. "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 word relates to the National Assembly choosing or selecting persons to hold political positions."
88. We agree with the above and we therefore find and hold that the definition of election as discussed above, equally applies to this Reference.
89. Two, that while Article 50 provides for the National Assembly of each Partner State to elect nine members of the EALA, it gives no directions on how the election is to be done, except for the stipulation that the nine must not be elected from members of the National Assembly and 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 and as was held at page 29 to 30 of the

Prof. Anyang Nyongo's case:

" 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 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.".

90. This is in recognition of the fact that each Partner State has its peculiar circumstance to take into account. Here, we take judicial notice of the fact that the number of political parties in the Partner States differ from one State to another. In some of them there are more than a dozen political parties, namely, Kenya and Tanzania. In our view, this explains why the framers of the Treaty in their wisdom, for the purposes of uniformity for all the Partner States used the word 'various' to allow for the diversity in their circumstances.
91. Three, that on May 30, 2012, the seventeen duly nominated and vetted candidates openly campaigned in Parliament and nine of them were subsequently elected as Uganda's members to the EALA (see Annex 'H' to the affidavit of Mrs. Jane Kibirige on pages 397 – 431 of the 1st Respondent's reply to the Reference).
92. On that basis, we find it difficult to resist the conclusion that what transpired on that day when the Parliament of Uganda constituted itself into an "Electoral College", was an election within both the dictionary meaning (see *Black' s Law Dictionary*) and in the context of both Article 50 of the Treaty and *Prof. Anyang Nyongo's case. (supra)*

It is for the above reasons that we must answer Issue No. 4 in the affirmative.

Issue No. 5- Whether the meaning and import of Article 50 (1) of the Treaty requires that all the six political parties represented in the Parliament of Uganda, shades of opinion, gender and other special interest groups be represented in EALA.

93. Mr. Rwakafuuzi, in answer to the issue contended that Issue 5 as framed in the joint conferencing memo arises from the pleadings. He thus rephrased it to read as follows: "Issue No. 5: Whether the meaning and import of Article 50 (1) of the Treaty requires that all the six political parties represented in the Parliament of Uganda, should be represented in EALA."
94. It is the Applicant's case that since Uganda has only six political parties in Parliament, it was feasible for all of them to be represented in the EALA in fulfillment of the requirement of Article 50 (1) of the Treaty. It is the learned Counsel's argument that the Treaty envisaged some concept of proportional representation, in contradiction to "winner takes it all". He argued further that the framers of the Treaty in their wisdom knew that there will always be a ruling party in Parliament with the majority and if the framers of the Treaty had wanted that only the majority in Parliament would elect Representatives to the EALA, the Treaty would have said so. It is his argument therefore, that the Treaty does not talk of numerical strength as the basis of representation and asserts further that the Treaty provides that parties in Parliament be represented irrespective of their numerical strength.

It is Mr. Rwakafuuzi's main argument that the Rules of Procedure for the election of members of EALA in Uganda, are inconsistent with the Treaty.

95. Learned Counsel contended further that the Court in *Hon.Jacob Oulanyah's case (supra)* impeached the Rules of Procedure for the election of members to the EALA

for providing numerical strength as a basis for election to the EALA. That the Court reasoned that the precept of numerical strength tended to exclude independents who should be allowed to participate in any electoral exercise.

96. Further to the foregoing, Learned Counsel had the following to say in respect of the impugned Rules:
    (a) That this Court should examine the impugned Rules and find whether they contravene Article 50(1) of the Treaty.
    (b) That the impugned Rules were not capable of guiding any conduct in the election of the EALA members. By way of illustration, Counsel cited the following:
        (i) The Rules talk of "political parties represented …in Parliament", but they do not go on to tell what are the political parties represented in Parliament and what is to be expected in relation to the proposed elections by the Parliament. Counsel submitted further that the said Rules do not say whether all parties or which of them will be represented in Parliament, and the standard of qualification of any such party to have a member or members elected for the EALA.
        (ii) The Rules talk of "shades of opinion", but they do not go on to tell what shades of opinion.It is the Counsel's stance that the "shade" must be mentioned in the Rules so that the shade is either agreed unanimously or arrived at by majority rule.
        (iii) The Rules talk of 'gender' but they do not say how gender shall feature.
        (iv) The Rules go on to mention "…and other special interest groups …" but they do not specify what special interest groups were to be represented, how were they to be identified and how would they be nominated.
97. In conclusion, Counsel submitted that the said Rules were not merely permissive but were vague and allowed whimsical and arbitrary conduct, not envisaged under Article 50 of the Treaty. He argued further that there was no gazettement of the impugned Rules.
98. Counsel asserts in that regard that lack of gazettement continue to show that the Rules were not meant to guide objective conduct of the members in electing Members to the EALA. That since the persons to be elected were outside Parliament, it was necessary to give such persons notice of the gazettement of the existence of those Rules.
99. In reply, Counsel for the 1st Respondent contended that as the Counsel for the Applicant had fully participated in the Scheduling Conference in the framing of the issues, it is just unfair for the Applicant's Counsel to purport to amend Issue No. 5 of the basis that it does not flow from his pleadings. Counsel thus proceeded to answer the instant issue as framed and agreed by the Parties on the material day.
100. It is the learned Counsel's submission in the main therefore, is that the meaning of Article 50(1) of the Treaty has already been set out in *Reference No. 6 of 2011 – Democratic Party and Mukasa Mbidde vs The Secretary General of the East African Community & Another* and therefore, does not need further adjudication. But for ease of reference and clarity we hereby reproduce what this Court stated at pg. 15 of that judgment:

"the essential requirement for EALA elections provided for in Article 50(1) of the

Treaty are:

- 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;
  (d) other social interest group; the procedure for elections shall be determined by the National Assembly".

101. From the foregoing, it is the Counsel's contention, that there is nothing that requires this Court to interpret whether the rules of procedure adopted by the National Assembly of Uganda conform to Article 50(1). He contended further that for this Court to assign a meaning or attempt to assign a meaning to Article 50(1) of the Treaty as framed in Issue 5 would amount to usurping the power conferred to the National Assembly of Uganda to make Rules of Procedure as provided under Article 50(1) of the Treaty.

For the above reasons, Counsel urged this Court to answer the issue as framed in the negative.

102. In his submissions, Counsel for the 1st Respondent contended that Rule 13(1) of the Rules of Procedure for the Election of Members to the EALA spelt out clearly that all the political groups/organizations who wished to contest for the EALA were free to do so. It specifically included all the political parties and organizations represented in Parliament, shades of opinion, gender and other special interest groups represented in the Parliament of Uganda. That the process and procedure for nomination, campaigns and subsequent elections guaranteed the participation of any interested person.

103. He further contended that guaranteeing slots as advocated for by the Applicant would have in essence fettered the power of Parliament to "elect" members to EALA and, therefore, risked being in contravention of Article 50(1) of the Treaty. Counsel further argued that had the Rules of Procedure allocated or guaranteed six slots to the six political parties that are represented in the Parliament of Uganda that would amount to the exclusion of the other groups mentioned in Article 50(1) of the Treaty and the purpose of an election would be defeated.

104. According to Counsel, it is now clear that each National Assembly of a Partner State has the power to "elect", and that it is a central requirement towards compliance with the provisions of Article 50(1) of the Treaty. That any Rules of Procedure that deprive a National Assembly of the Partner State of the mandate of electing a member to the EALA would be in violation of the Treaty.

105. Counsel concluded by submitting that, in light of the foregoing, it is obvious that the meaning and import of Article 50(1) of the Treaty would not require that all six political parties represented in the Parliament of Uganda should be represented in the EALA.

106. Learned Counsel for the Interveners forcefully opposed the Applicant's stance and contended that the Parliament of Uganda passed the new Rules after the *Mbidde*

*Case (supra)* whereby this Court categorically stated that the National Assemblies of the Partner States shall have the exclusive role of making their own Rules of Procedure for the elections.

107. That the Parliament of Uganda in its wisdom made the 2012 Rules in conformity with Article 50 of the Treaty and that the said Rules did not exclude any political party or any category of persons.

108. According to Counsel, the 2012 Rules no longer embodied the phrase "numerical strength" as is alleged by Hon. Ken Lukyamuzi in his affidavit.

109. Counsel drew the Court's attention to the copies of the Hansard Reports on record, which amply shows that there was nomination of the candidates, that those nominees were given opportunity to campaign and that the voting process on the electionday was by secret ballot. Subsequently, there was the counting of votes and finally the announcement of results.

110. Lastly, Counsel submitted that those elected to the EALA represent the various political parties represented in the Parliament of Uganda, shades of opinion, gender and other special interest groups as stipulated in Article 50(2) of the Treaty. He prayed that this issue be answered in the negative.

111. From the outset, we must note that we have already addressed the issue of rephrasing of issues earlier on in this judgment. We reiterate our decision on this point, and we need not belabour the point.

112. On the issue at hand, it is apparent from the Applicant's pleadings and the submissions, that the Applicant's main complaint is that the new Rules of Procedure are not in conformity with Article 50 of the Treaty, basically on the ground that the Rules did not guarantee a slot in the EALA for each political party represented in the Parliament of Uganda.

113. With due respect to the Counsel for the Applicant, we are not persuaded by his argument. It is agreed that there are six political parties in the Parliament of Uganda and that each had a chance to nominate candidates to stand for election on the Election Day for members to the EALA.

114. Further, that the very nature of any election would necessitate that no candidate is assured of election merely because he is supported by a particular political party.

115. We are also firmly of the view that as rightly argued by the Counsel for the parties opposing the Reference, that the impugned Rules for the election of Members to the EALA that were passed following this Court's order in the *Mbidde case (supra)* conformed to Article 50(1) of the Treaty. Further to that, we are also satisfied that the Rules were made by following a proper interpretation of Article 50 as laid down in *Prof. Anyang' Nyongo' case (supra)* and the *Jacob Oulanyah case (supra)*. We need not go further than this on this point, as we have already done so, while considering and determining Issue No. 4.

116. For the above reasons, we conclude by saying that the meaning and import of Article 50 (1) of the Treaty does not require that all the six political parties represented in the Parliament of Uganda should be represented in the EALA.

We accordingly answer Issue No. 4 in the negative.

Issue no 6: the applicant abandoned this issue.

Issue no. 7- whether the parties are entitled to the remedies sought

117. In light of our findings and conclusions on the issues herein:

1. Prayers (a), (d), (g) and (h) are disallowed.
2. As prayers (b), (c) and (e) were abandoned during the hearing the Court makes no order in respect of the said prayers.
3. Having regard to the fact that the instant Reference falls in the category of public interest litigation, each party shall bear his or its costs.

**Conclusion**

In conclusion, the Reference stands dismissed. Each party shall bear his/its costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No.6 of 2012

**Among A. Anita And Attorney General of Uganda And The Secretary General of the East African Community**

**And**

**Hon. Margaret Nantongo Zziwa, Hon. Dora Byamukama, Hon. Benard Mulengani, Hon. Dan Kidega, Hon. Mike Sebalu , Hon. NusurA Tiperu, Hon. Susan Nakawuki, Hon. Chris Opoka and Hon. Mukasa Fred Mbidde - Interveners**

Jean-Bosco Butasi, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, J, Isaac Lenaola, J, Faustin Ntezilyayo, J
November 29, 2013

*Gazetting of national laws and rules outside the Court's jurisdiction- No requirement for provision for slots for interest groups: women, youth, persons with disabilities- Whether Uganda's Rules of Procedure for the election of members of the EALA were inconsistent with the Treaty - Whether the elections conducted by the Parliament of Uganda were null and void.*

*Articles 9 (1) (f), 23(1), 27(1), 30(1), 33(2), 50(1) of the Treaty for the Establishment of the East African Community- Rules 13(1) and (2) of Appendix B of the Rules of Procedure for the Election of Members of the East African Legislative Assembly, 2012 (Uganda).*

Pursuant to Article 50(1) of the EAC Treaty, the Parliament of Uganda passed the Rules of Procedure for the election of EALA members, 2006, providing for election of members of the EALA. Thereafter, in the case of *Hon. Jacob Oulanyah v The Attorney General of the Republic of Uganda, Constitutional Petition No. 28 of 2006*, the Constitutional Court of Uganda found that the Rules contravened Article 50 of the Treaty and various Articles of the Constitution of Uganda and declared them 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. The appeal was still pending when Mr. Mukasa Mbidde, a member of the Democratic Party filed Reference No. 6 of 2011 in this Court seeking an interpretation of the Treaty.

In a judgment given on 10th May 2012, in the case of *Democratic Party & Mukasa Mbidde Vs The Secretary General to the East African Community and the Attorney general of the Republic of Uganda, EACJ Reference No. 6 of 2011*, this Court annulled the said Rules on the ground *inter alia* that they were contrary to Article 50(1) of the Treaty and consequently ordered the Government and the Parliament of the Republic of Uganda to amend the then existing Rules of procedure for election of members of the EALA, 2006 to bring them in conformity with Article 50(1) of the Treaty.

On the 18th day of May 2012, the Parliament of the Republic of Uganda enacted the Rules of Procedure for the Election of Members of the East African Legislative Assembly, 2012.

The Applicant, a resident of Uganda, and a member of the Forum for Democratic Change (FDC), one of the Political Parties registered in Uganda was the party's candidate nominated to contest in the elections for membership to the East African Legislative Assembly. The Applicant challenged the legality of the Rules of Procedure, particularly Rule 13(1) and (2) of Appendix B, as infringing the provisions of the Treaty, on the grounds that they did not cater for and guarantee representation in the EALA for each of the interest groups mentioned under Article 50(1) of the Treaty. She also averred that the Rules were never gazetted for the benefit of the interest groups further infringing upon the Treaty and the Constitution of the Republic of Uganda.

**Held:**

1) The Rules of Procedure for election of members of the EALA, save Rule 13(1) and (2) of Appendix B, were in substance consistent with the provisions of Article 50(1) of the Treaty. However, Rule 13 of Appendix B was alien to both the spirit and requirements of Article 50(1) of the Treaty and the 1st Respondent should amend it to conform with Article 50(1) prior to the next EALA elections.
2) Gazetting of laws and rules after their enactment by the Parliament is governed by relevant Ugandan laws, consequently, the competent Ugandan institutions should resolve questions arising out of this matter as this fell outside the Court's jurisdiction.
3) There is no requirement deduced from Article 50(1) of the Treaty that the said election rules should provide for specific slots for the interest groups set out in the Article or that they should provide for guarantees of representation, specifically of women, youth and persons with disabilities or any specified grouping where such representation is not "feasible." This Court was not clothed with the jurisdiction to determine such feasibility as this was left to the discretion of the National Assemblies of Partner States.

**Cases cited:**

Abdu Katuntu v The Attorney General of Uganda, The Secretary General of the East African Community & 9 Others, EACJ Reference No.5 of 2012

Democratic Party & Mukasa Mbidde v The Secretary General to the East African Community and the Attorney General of the Republic of Uganda, EACJ Reference No. 6 of 2011

Hon. Jacob Oulanyah v The Attorney General of the Republic of Uganda, Constitutional Petition No. 28 of 2006

Prof. Anyang' Nyong'o and 10 Others v Attorney General of Kenya & Others, EACJ Reference No 1of 2006

The East African Centre for Trade Policy and Law v.The Secretary General of the East African Community, EACJ Reference 9 of 2012

## Judgment

**Introduction**

1. This is a Reference by one Among A. Anita, a resident of Uganda and a member of the Forum for Democratic Change (FDC) – one of the registered Political Parties in Uganda, (hereinafter referred to as the "Applicant"). She was the official party candidate who had been nominated to contest in the elections for membership to the East African Legislative Assembly (hereinafter referred to as the "EALA") in 2012. Her address for the purpose of this Reference is indicated as C/O M/S Kyazze & Co. Advocates, Plot 2, Jumbo Plaza, Room 1.2, Parliament Avenue, and P.O. Box 3064, Kampala, Uganda.
2. The instant Reference was filed on 15th June 2012 under Article 30 of the Treaty for the Establishment of the East African Community and Rules 10 and 24(1) of the East African Court of Justice Rules of Procedure (hereinafter referred to as the "Treaty" and the "Rules", respectively). It is also premised on Articles 9 (1) (f), 23(1), 27(1), 30(1), 33(2), 50(1) of the Treaty.
3. The Respondents are the Attorney General of the Republic of Uganda and the Secretary General of the East African Community and they are sued on behalf of the Government of Uganda and of the East African Community in their respective capacities as the Principal Legal Adviser of the Republic of Uganda and the Principal Executive Officer of the Community.
4. It is also worth noting that on 17th August 2012, nine interveners, namely, the Uganda Representatives to the EALA filed a Notice of Motion under Article 40 of the Treaty and Rule 36 of the Rules. This Court granted their Application on 5th February 2013. The Court also allowed the Interveners' supporting affidavit deponed by one Hon. Margaret Nantongo Zziwa (the 1st Intervener) to serve as the statement of intervention as provided under Rule 36(4) of the Rules. Further to the foregoing, the Interveners were allowed to make submissions.

**Representation**

5. The Applicant was represented by Mr. Joseph Kyazze and Mr. Simon Kiiza. Ms. Robina Rwakoojo, Mr. Philip Mwaka, Mr. Elisha Bafirawala, Ms. Maureen Ijang and Ms. Eva Kavundu appeared for the 1st Respondent, while Mr. Wilbert Kaahwa, Learned Counsel to the Community appeared for the 2nd Respondent. The Interveners were represented by Mr. Justin Semuyaba.

**Background**

6. The EALA is an organ of the East African Community established under Article 9 of the Treaty.

   Article 48 of the Treaty provides for the membership of the EALA as follows:

   "1. The membership of the Assembly shall comprise:

   (a) Nine members elected by each Partner State; and

   (b) Ex-officio members (...)."

   As for the election of members of the EALA, Article 50 (1) provides that:

   "1. The National Assembly of each Partner State shall elect, not from its members,

nine members of the Assembly, who shall represent as much as 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."(...)"

7. Pursuant to the above Article, the Parliament of Uganda passed the Rules of Procedure for the election of EALA members, 2006, providing for election of members of the EALA.
8. In its Ruling in *Hon. Jacob Oulanyah Vs The Attorney General of the Republic of Uganda, Constitutional Petition No. 28 of 2006*, the Constitutional Court of Uganda found that the aforesaid Rules were in contravention of Article 50 of the Treaty and various Articles of the Constitution of Uganda and declared them 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.
9. In a Reference predicated on conformity with Article 50(1) of the Treaty brought by the Democratic Party (DP), one of the registered Political Parties in the Republic of Uganda and Mr. Mukasa Mbidde, one of its members, this Court, in its judgment dated 10th May 2012, annulled the said Rules on the ground *inter alia* that they were contrary to Article 50(1) of the Treaty and consequently ordered the Government and the Parliament of the Republic of Uganda to amend the then existing Rules of procedure for election of members of the EALA, 2006 to bring them in conformity with Article 50(1) of the Treaty. (See *Democratic Party & Mukasa Mbidde Vs The Secretary General to the East African Community and the Attorney general of the Republic of Uganda, Reference No. 6 of 2011*).
10. Given the foregoing obligation to comply with the provisions of the Treaty, it became necessary to make new rules for the election of members of EALA for the 2012 elections. In the course of the debate, the Parliament of Uganda failed to reach a consensus on the interpretation of Article 50(1) of the Treaty and unanimously resolved to have the matter referred to this Court by the Attorney General for a proper interpretation of the said Article in so far as representation covering the interest groups set out in Article 50(1) is concerned.
11. Nevertheless, the matter was not referred to this Court but the Parliament of the Republic of Uganda, on the 18th day of May 2012, went on to enact the Rules of Procedure for the Election of Members of the East African Legislative Assembly, 2012 (hereinafter referred to as "Rules of Procedure").
    The instant Reference challenges the legality of the said Rules as being inconsistent with the Treaty.

The Applicant's Case

12. The Applicant's case is contained in the Reference filed on 15th June 2012, her affidavits sworn on 11th June 2012 and 27th August 2012 and affidavits filed by Mr. Tuhamire Robert on 12th February 2013 and 18th March 2013, as well as her submissions.
13. The Applicant's Reference challenges the legality of the Rules of Procedure, particularly Rule 13(1) and (2) of Appendix B, as being inconsistent with or constituting an infringement of the provisions of the Treaty, particularly Articles 23(1), 27(1), 38(1)

and 50(1) on the grounds that, in substance, they do not cater for and guarantee representation in the EALA for each of the interest groups mentioned under Article 50(1) of the Treaty.

14. Another contention of the Applicant is that the Rules were never gazetted for the benefit of the interest groups envisaged in Article 50(1) of the Treaty in further infringement of the Treaty and provisions of the Constitution of the Republic of Uganda.

    It is her contention that the failure to gazette the Rules renders them null and void.

15. The Applicant therefore seeks the following declaratory orders:
    f) That the said Rules of Procedure for election of members of the EALA 2012 are null and void;
    g) That the said Rules are inconsistent with or otherwise an infringement of the provisions of Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty;
    h) That the nomination and subsequent election of the members of the EALA by the Parliament of Uganda conducted under or in pursuance of the said Rules is not only unlawful but an infringement of the Treaty and therefore ought to be set aside;
    i) That the 2nd Respondent ceases to recognize the persons elected by the Parliament of Uganda to the EALA;
    j) That the 1st Respondent be ordered to cause the enactment of Rules of Procedure for the Election of members of the EALA that are in conformity with Article 50(1) of the Treaty;
    k) That an order that fresh nominations and elections of the EALA members from Uganda be conducted under proper Rules of Procedure; and
    l) That the Respondents be ordered to pay the costs of the Reference.

**First Respondent's Case**

16. The 1st Respondent's case is set out in his response to the Reference filed on 10th August 2012 which was supported by the affidavits of Mrs. Jane L. Kibirige, the Clerk to the Parliament of Uganda together with that of Mr. Alex Atuhaire and his submissions.
17. In a nutshell, his response is as follows:-
    d) That the Parliament of the Republic of Uganda amended and adopted Rules of Procedure, particularly Rule 13(1) and (2) of Appendix B.
    e) That the 2012 Rules of Procedure are in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.
    f) That the impugned Rules enabled the various Political Parties represented in Parliament, shades of opinion, gender and special interest groups to nominate any number of candidates to participate in the EALA elections, and a total of seventeen persons were nominated.
    g) That pursuant to Rule 13 (1) of Appendix B, the National Resistance Movement Party (NRM), the Democratic Party (DP), the Conservative Party (CP), and the Uganda People's Congress (UPC), and the Independents, all nominated candidates to contest for elections to the EALA. The Forum for Democratic Change (FDC) and JEEMA opted not to nominate or otherwise participate in the

election process.

h) That the said EALA elections were conducted by secret ballot and in conformity with Articles 23 (1), 27(1), 38(1) and 50 (1) of the Treaty.

i) That, in the alternative, but without prejudice to the foregoing, any non-conformity was not fatal or material to the enactment of the said Rules or conduct of the said elections.

j) That the Reference is misconceived, without merit, frivolous and bad in law and the Applicant is not entitled to the orders sought. He therefore prays that the Court should dismiss the Reference with costs.

**Second Respondent's Case**

18. The 2nd Respondent filed his Response on 9th August 2012 and his submissions on 22nd April 2013. His case is as follows:-

d) That the matters contained in the Applicant's case are, pursuant to Article 52 of the Treaty, tantamount to questions of an election of representatives of a Partner State to the EALA, which must be determined by an institution of the Republic of Uganda that determines questions of the election of members of the National Assembly.

e) That the Reference does not allege any wrongdoing on the part of the 2nd Respondent and therefore there is no cause of action against him.

f) That the recognition of elected members of the EALA is a function of the Law as provided under the Treaty and the Rules of Procedure of the EALA. On the basis of that Law, he is bound to take cognizance of the election of members of the EALA as duly communicated to him.

g) That the granting of the orders sought by the Applicant:

(1) does not arise;

(2) would unduly interfere with the smooth operations of the East African Community.

19. The 2nd Respondent therefore prays that this Court should dismiss the Reference with costs.

**The Interveners' position**

20. Briefly, their position is as follows:

a) That the process of enacting the Rules of procedure for the election of representatives of Uganda to the EALA followed the established legal mandate of the Parliament of Uganda and the adopted Rules of Procedure, particularly Rule 13(1) and (2) of Appendix B, was consistent with and not in contravention of the provisions of Articles 50(1) of the Treaty.

b) That the 2012 Rules of Procedure are in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.

c) That these Rules enabled the various political parties represented in the Parliament of Uganda, shades of opinion, gender and special interest groups to nominate any number of candidates to participate in the EALA elections.

d) That the said EALA elections were conducted by secret ballot and in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.

e) In the alternative, but without prejudice to the foregoing, that any non-conformity was not fatal or material to the enactment of the said Rules or conduct of the said elections.
f) That the Reference is misconceived, without merit, frivolous, bad in law and the Applicant is not entitled to the Orders sought.

21. The interveners therefore also pray that the Reference should be dismissed with costs.

**Scheduling Conference**

22. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 6th February 2013 at which the following were framed as points of agreement and disagreement respectively:

**Points of Agreement**

23. Both parties agreed that:
a) The Parliament of Uganda passed Rules of Procedure for election of members of the EALA on the 18th May 2012.
b) The nomination and election of the members of the EALA was advertised in the "New Vision" newspaper of 17th May 2012, in which the date for picking nomination forms was publicised on 17th May 2012, nominations were set for Monday 21st to Tuesday 22nd May 2012 and elections for 30th May 2012.
c) The Parliament of Uganda held elections for the EALA representatives on the 30th May, 2012.
d) The elections of Uganda's current representatives to the EALA were conducted under the said Rules.
e) Following the elections the names of Uganda's EALA representatives were gazetted in the Uganda Gazette, Volume CV No. 29 dated 31st May, 2012 and, in the East African Community Gazette under Volume AT 1/9 dated 8th June, 2012. The names of Uganda's representatives were communicated to the 2nd Respondent by the Clerk to the Parliament of Uganda in her letter Ref. AB: 117/122/01 dated 31st May, 2012.
f) The Reference raises triable issues meriting adjudication and pronouncement by this Court.

24. Points of disagreement/Issues for determination by the Court
1) Whether the Court is vested with the jurisdiction to entertain this Reference.
2) Whether the Rules of Procedure for the election of members of the EALA cited as the Rules of Procedure of Parliament 2012 particularly Rules 13(1) and (2) are in substance inconsistent with the Treaty and its application, specially Articles 23(1), 27(1), 38(1) and 50(1).
3) Whether or not the Rules were gazetted and if not whether the failure to gazette rendered them null and void.
4) Whether in view of the Court's findings on issues (2) and (3), any acts, decisions made or elections conducted by the Parliament or Government of Uganda pursuant to the Rules are null and void.
5) Whether the parties are entitled to the remedies sought.

It was further agreed at the aforesaid Conference that evidence would be by way of

affidavits.

25. The parties also agreed to file written submissions in respect of which they would make oral highlights at the hearing.
26. The parties noted that the case presented no possibility of mediation, conciliation or settlement.

**Determination of the issues by the Court**

Issue No.1: Whether the Court is vested with the jurisdiction to entertain this Reference

**Submissions**

27. Counsel for the Applicant contended that the issue of jurisdiction is clearly moot and academic and should not arise. It was his view that challenging the jurisdiction of the Court at the initial stage of the Reference offends the rule on approbation and reprobation. He asserted that the Respondents cannot on one hand concede that the Reference raises triable issues meriting adjudication by the Court and further to the 2nd issue inviting the Court to determine whether the rules are in substance inconsistent with the Treaty and on the other hand, dispute and challenge the Court's jurisdiction since they cannot approbate and reprobate at the same time.
28. Counsel went on to point out that the issue pertaining to whether the Court is vested with the jurisdiction to entertain this Reference has three facets. On the first facet, Learned Counsel submitted that since it was agreed at the Scheduling Conference that this Reference raises triable issues that merit adjudication by this Court, it is his understanding that the triable issues relate specifically to the question of legality of the Rules of Procedure of election of members to the EALA, 2012 and that falls within the ambit of the jurisdiction of this Court under Article 23(1), 27(1) and Article 30(1) of the Treaty. In support of his submissions on this issue, Counsel cited the case of *Modern Holdings (EA) Limited Vs Kenya Ports Authority, EACJ Reference No. 1 of 2008*.
29. With regard to the second facet, Mr. Kyazze argued that Article 30(1) as read together with 23(1) and 27(1) confer upon this Court the jurisdiction to determine the legality of the Rules, regulations, directives and actions of the Partner States on account that such regulations are unlawful or constitute an infringement of the provisions of the Treaty and are therefore inconsistent with the Treaty. Learned Counsel contended that this calls for interpretation and application of the provisions of the Treaty within the parameters of the jurisdiction of this Court as provided for by the aforementioned Articles of the Treaty. Counsel then referred the Court to authorities which, according to him, support his submission that this Reference falls within the mandate of this Court. These authorities are: *Modern Holdings (EA) Limited Vs Kenya Ports Authority (supra); James Katabazi & others Vs The Attorney General of the Republic of Uganda and Secretary General of the East African Community, EACJ Reference No. 1 of 2007; The East African Law Society & 3 others Vs The Attorney General of the Republic of Kenya & 3 others, EACJ Reference No. 3 of 2007; and Prof. Peter Anyang' Nyong'o &others Vs The Attorney General of the Republic of Kenya & others, EACJ Reference No. 1 of 2006*.
30. Concerning the third facet, Mr. Kyazze argued that it revolves around the issue of

interpretation of Articles 23, 27, 30 of the Treaty on the one hand and Article 52 of the Treaty that the Respondents seek to rely on for the submission that this Court is devoid of jurisdiction to entertain this Reference, on the other hand. He contended that the challenge on the legality of the Rules and their being an infringement of the Treaty falls under Article 30(1) and completely outside Article 52 of the Treaty. It was his view that the said Article does not cover the challenge, which is the substance of this Reference, but that it only covers elections and membership, not the law under which those elections were conducted, which is the 'the gist of this Reference.' He referred the Court to two cases, namely, *The East African Law Society case* and the *Katabazi case (supra)* in support of his position in that regard.

31. As regards the assertion by the Respondents that the matters in the Reference are tantamount to questions of an election of representatives of a Partner State to the EALA to be determined by an institution of the Republic of Uganda that determines questions of elections under Article 52 of the Treaty, and thus falling outside the jurisdiction of this Court, Counsel opposed this contention arguing that the Reference is not an election petition, but that "the challenge is essentially on the legality of the Rules, and what transpired there-under. The nullification of the elections can only be the inescapable consequence of the nullification of the Rules under which the elections were conducted. Of course once the law is nullified, so are the acts/activities carried out there-under."
32. Counsel then distinguished between the jurisdiction of this Court and its power to grant consequential reliefs in the context of Article 52 of the Treaty, relying on two cases, namely, *The Attorney General of the United Republic of Tanzania Vs African Network for Animal Welfare (ANAW), EACJ Appeal No. 3 of 2011; Prof. Peter Anyang' Nyong'o & others Vs The Attorney General of the Republic of Kenya & others, EACJ Reference No.1 of 2006*. He thus maintained that the essence of the Applicant's Reference is to challenge the legality of the Rules of Procedure for the Election of Members of the EALA, and not the issue whether the nine representatives of Uganda were elected members of the EALA for Article 52 to apply, putting the matter outside the jurisdiction of this Court as contended by the Counsel for the Respondents.
33. In the same vein, Counsel distinguished the present Reference from the Case of *Christopher Mtikila Vs Attorney General of the United Republic of Tanzania and the Secretary General of the East African Community, EACJ Reference 2 of 2007*. The latter, as he put it, was premised on the application of Article 52 of the Treaty and was strictly on elections and membership and the issue of the legality of the Law under which the elections were conducted, which is the essence of this particular case, was never a subject of that decision.
34. Counsel also submitted that in terms of the scope of jurisdiction, Article 30 of the Treaty envisages that the Court determines the legality of an Act that has been enacted and come into force, any regulation that has been made, a directive that has been given, a decision that has been taken and an action that has been done or conducted. He added that, if upon reference to this Court of any of the aforementioned, the Court finds an infringement of the Treaty, or unlawful action, it has to hold so 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. He referred to *East African Law Society & 3 others Vs The Attorney General of the Republic of Kenya & 3 others (supra)*, at pages 41 and 43 in support of his assertion.

35. For all the reasons set out above, Counsel for the Applicant prayed that the Court should make a finding that this Court has jurisdiction to determine this Reference.
36. Counsel for the 1st Respondent, in his response, pointed out that Article 23 and 27 of the Treaty spelt out the jurisdiction of this Court. He emphasised that these provisions set out the authority and or extent of power conferred upon this Court in determining issues that are brought before it. Stressing that Article 27(1) particularly confines the exercise of the Court's authority to matters which do not include the application or any interpretation to jurisdiction conferred by the Treaty on the organs of Partner States, he submitted that removal or annulling the election of members to the EALA are such matters to which the Court has no jurisdiction. He then referred the Court to *Anyang' Nyong'o and Mtikila cases*.
37. He further submitted that this position is strengthened by the provisions of Article 52 of the Treaty, which vests the question of inquiry into elections of members to the EALA to the relevant institutions of Partner States.
38. Article 52 of the Treaty provides:
    "Questions as to Membership of the Assembly
    1. Any question that may arise whether any person is an elected member of the Assembly or whether a seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the elections of members of the National Assembly responsible for the election in question.
    2. The National Assembly of the Partner States shall notify the Speaker of the Assembly of every determination made under paragraph 1 of this Article."
39. Building on the above provisions and relying on the *Anyang' Nyong'o and the Mtikila cases*, he argued that any question as to the membership to the EALA shall be exclusively determined by institutions of a Partner State.
40. With reference to prayers (a), (b) and (c) sought by the Applicant, Counsel submitted that the above orders and declarations seek to annul and nullify the elections conducted on the 30th May 2012 resulting in the election of the nine Ugandan Representatives to the EALA. He added that the orders and declarations also inquire into the membership of the Ugandan Representatives to the EALA, which, under Article 52 of the Treaty is a sole preserve of institutions of a Partner State. He further asserted that this Court is a creature of the Treaty and so is any jurisdiction conferred upon it and it therefore, follows that this Court cannot grant reliefs on matters which are not within its jurisdiction, namely, the prayers sought herein by the Applicant.
41. Counsel further pointed out that the change made by the Applicant in the prayers sought in her submissions are different from those contained in her Reference and urged the Court to restrict itself to the reliefs claimed by the Applicant in the Reference and to disregard the two other prayers added by the Applicant, namely, a declaration to set aside the nomination and election of the nine members of the EALA by Parliament of Uganda, and an order that new Rules of Procedure be enacted.
42. Finally, Learned Counsel refuted the statement made by the Applicant's Counsel that the 1st Respondent had conceded that the Court has jurisdiction over this matter. He

then maintained that this Court has no jurisdiction conferred by the Treaty to grant the reliefs sought by the Applicant in her Reference.

43. As for Counsel for the 2nd Respondent, he first of all submitted on the term "jurisdiction" which, according to T*he Dictionary of Words and Phrases Legally Defined Edited by John Saunders, 2nd Edition, Volume 3 at p.113*, means "... 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 statute, charter or commission under which the Court is constituted, and may be extended or restricted by the like means."
44. He went on to give a list of cases in which the said meaning on the power of Court to hear and decide on a case was emphasised. (see *Rv. Kent Justices ex parte Lye [1967] 2 QB 153, Union Transport Plc v Continental Lines SA [1992] I WLR 15; Christopher Mtikila Vs The Attorney General of the United Republic of Tanzania & Another, EACJ Reference No. 2 of 2007; East African Law Society Vs The Secretary General of the East African Community, EACJ Reference No. 1 of 2011; Hon. Sitenda Sebalu Vs. The Secretary General of the East African Community & 3 others; Modern Holdings (EA) Limited Vs Kenya Ports Authority, EACJ Reference No. 1 of 2008*).
45. Further to the above, Counsel asserted that the issue of jurisdiction of this Court in the matter at hand is a triable issue that requires interpretation by this Court as articulated by parties at the Scheduling Conference and thus contended that this issue is not "just moot or academic."
46. Counsel also contended that the matters contained in the Applicant's pleadings are, pursuant to Article 52 of the Treaty, questions of an election of representatives of a Partner State to the EALA, which must be determined by an institution of the Republic of Uganda that determines questions of the elections of members of the National Assembly, namely the High Court. He therefore, pleaded that the dispute on elections of the EALA members from the Republic of Uganda should not be heard by this Court, which should therefore divest itself of jurisdiction to determine it. On this submission, he relied on the decision of this Court in the *Mtikila case (supra)*.
47. With regard to submissions by Counsel for the Interveners, Learned Counsel, in a nutshell, asserted that, since the essence of the Reference is the nullification of elections of the EALA members from Uganda, this Court has no jurisdiction over this matter which, as he pointed out, should be determined through an election petition reserved to national courts under the terms of Article 52 of the Treaty. In support of his stance, he referred the Court to the *Anyang' Nyong'o and Mtikila* decisions.

**Decision of the Court on Issue No.1**

48. From the outset, we deem it necessary to look into the meaning of the word "jurisdiction". We agree with the Counsel for the 2nd Respondent that the definition given to the term "jurisdiction" is correct.
49. Following the above, it is noteworthy to recall, as it has been stated previously by this Court, that the Treaty is an international treaty and subject to international law on interpretation of treaties and specifically Article 31(1) of The Vienna Convention on the Law of Treaties, which sets out the general rule in the interpretation of treaties as follows:

a) A treaty shall be interpreted in good faith and
b) In accordance with the ordinary meaning to the terms of the treaty in their context, and
c) In the light of the object and purpose of the treaty.

(see *Anyang' Nyong'o case*, p. 10 and *East African Centre for Trade Policy and Law Vs. The Secretary General of the East African Community, EACJ Ref. 9 of 2012, p. 13*).

50. We shall be guided by the above principles in determining the issues framed in this Reference, particularly the issue at hand where this Court has to determine whether it has the jurisdiction to entertain the Reference.
51. The Treaty describes the role and jurisdiction of this Court in two distinct but clearly related provisions: In Article 23 (1), the Treaty provides that:
"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."
Moreover, in Article 27(1), it provides that:
"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 Sates."
The Treaty also provides in Article 30 (1) and (3) that:
"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.
2...
3. 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."
52. Applying the principles and provisions above, we hereby make the following findings: At the Scheduling Conference, parties agreed that the Reference raised triable issues meriting adjudication and pronouncement by this Court. We have elsewhere above reproduced those issues. However, on careful examination of all those issues, we are of the view that issue No. 2 is vividly within our jurisdiction. Therefore, considering the foregoing and guided by the pre-cited cases of *Anyang' Nyang'o and Mtikila*, we are of the firm view that the Court would be failing in its duty under Articles 23 and 27 of the Treaty as read together with Article 30 and 50(1), if it refuses to determine the said issue on the ground that it does not have jurisdiction. We shall, therefore, hold that we have the requisite jurisdiction to determine the issues raised in the Reference, but subject to what we shall say about matters revolving around gazettement and the nullification of election of the EALA members raised in issues No. 3 and 4.
Accordingly, only the Applicant's prayers that fall under our jurisdiction will be the subject of our adjudication in this Reference.
Issue No.2: Whether the Rules of Procedure for the election of members of the East African Legislative Assembly cited as the Rules of Procedure of Parliament 2012, particularly Rules 13(1) and (2) are in substance inconsistent with the Treaty and its

application, specifically Articles 23(1), 27(1), 38(1) and 50(1)

**Submissions**

53. Counsel for the Applicant submitted that the gist of the Applicant's contention is that the impugned Rules, specifically Rule 13(1) and (2) do not in substance comply with Article 50(1) as they failed to cater for the interests and guarantees of representation in the EALA of each of the interest groups mentioned under Article 50(1) of the Treaty.
54. Counsel further argued that Article 50(1) provides for composition of nine members for the EALA as being representatives of the specified groupings that are set out herein.
55. According to him, the question that has to be raised first is whether there is any controversy on the correct import of the said Article vis-a-vis the Rules that were passed by the Parliament of Uganda. In this regard, he stressed that, while in the *Mbidde case* this Court has set out the essential requirements for elections as provided for by Article 50(1) of the Treaty, the Court, however, refrained from giving guidance or interpreting for the Parliament of Uganda as to what constitutes compliance with Article 50 or Article 50(1) because it considered that that issue was not in contention. Learned Counsel then urged the Court to pronounce itself on this issue in the present Reference.
56. In his interpretation of Article 50(1) of the Treaty, Counsel contended that the Parliament of Uganda is mandated with the power to make Rules that effectuate the letter and spirit of Article 50(1) of the Treaty. In that context, Parliament of Uganda is bound to cater for and to guarantee effective representation of the interests of each of the intended beneficiaries of Article 50(1). He argued that the mandate of the Parliament of Uganda under Article 50(1) is not unfettered to the extent that it may make any rules that suit its convenience or that of the majority in the National Assembly. In addition, he submitted that Article 6(d) of the Treaty obliges Partner States (acting directly or through their organs) to adhere to *inter-alia*, the principle of rule of Law. In support of his assertion, he referred to the *Katabazi case* at page 18, where this Court held that:
    "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 the established procedural steps that are referred to as due process..."
57. Relying on Articles 77 and 78 of the Constitution of Uganda and on the National Youth Council Act, Cap 319, Learned Counsel went on to show how those provisions give guarantees to the persons mentioned therein, to be represented in Parliament. In this regard, he asserted that in the above mentioned provisions, nothing was left for consensus to be reached by the relevant Electoral College or the entire electorate and that each and every interest to be represented in Parliament was catered for with precision, and the beneficiaries thereof were left in no doubt as to that fact.
58. Counsel added that the question of the guarantee of the representation of the interests of the persons and groups mentioned in Article 50(1) is a question of law, which arises out of the interpretation of the said Article. He submitted that Rule 13(1) and

(2) of the impugned Rules is supposed to have substantially provided for the specific slots for the interest groups set out in the Article and that it cannot purport to subject them to consensus.

59. Counsel also faulted the Parliament of Uganda on the ground that, in adopting Rule 13(1) and (2) of the impugned Rules, it reproduced the content of Article 50(1) rather than spelling out the proportionate representation that is envisaged under that Article, and for this reason, it has departed from the essence, the spirit and the intendment of Article 50(1) of the Treaty.
60. As for the applicability of the Treaty, Learned Counsel asserted that the impugned Rules are inconsistent with the Treaty and its application for the reasons, firstly, that they do not guarantee representation of women, the youth, and persons with disabilities, who are envisaged in Article 50(1) of the Treaty. Reading the said Article in the context of other provisions of the Treaty including Article 5(3), he contended that the absence of guarantees for the representation of women is inconsistent with the Treaty and its application and that "it seriously affects the set objectives of the Community."
61. Secondly, Counsel also argued that the Parliament of Uganda violated Article 6(d) of the Treaty which emphasizes the principles of democracy and rule of law and that in brief, the rule of law demands that whatever is done, ought to be done according to the law. It is therefore his stance that these principles were not respected by the Parliament of Uganda in carrying out activities such as setting up advertised dates for picking nomination forms, nomination and election dates before the Parliament had even passed the impugned Rules. To Counsel, this was a clear infringement of the Treaty since parties who intended to participate and benefit from the provisions of Article 50(1) were unable to know when to participate in the process before the Rules were passed.
62. Counsel also asserted that another infringement of the Treaty lies in the part of Rule 13(1) which reads: "after consultations and consensus by political parties and other members of Parliament". His argument in that regard was that, such a provision does not cater for special interest groups, gender and the youth who are not political parties or are not members of Parliament but were intended to benefit under Article 50(1) of the Treaty.
63. Concluding his submission, Counsel reiterated his contention that the Rules, specifically Rule 13(1) and (2) on the face of them clearly evidenced non-compliance with the Treaty as they never catered for the specific groupings envisaged in Article 50(1) of the Treaty.
64. Counsel for the 1st Respondent, on his part, contended that the language of the impugned Rules, specifically Rule 13 which is the basic issue in contention, is essentially the language which is contained in the Treaty itself. He further argued that, in determining whether Rule 13(1) and (2) of Appendix B of the amended Rules of Procedure is in substance inconsistent with the Treaty, it was important to examine whether the said Rules fulfil the essential requirements of Article 50 of the Treaty as set out in the *Mbidde case (supra)* where the Court stated that those essential requirements are the following:
    - "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 feasible
  a) the political parties in the National Assembly;
  b) shades of opinion;
  c) Gender;
  d) other social interest groups.
- the procedure for election shall be determined by the National Assembly."

65. Learned Counsel pointed out that, on 30th May 2012, the duly vetted and nominated seventeen candidates openly campaigned in the Parliament of Uganda and through secret ballot; nine of them were subsequently elected as representatives of the Republic of Uganda to the EALA. That this was done in total compliance with Article 50(1) of the Treaty and neither the Court nor the Applicant can fault the Parliament of Uganda for adopting the language contained in the Treaty.
66. He further asserted that, as regards the composition of the EALA, it is clear that there are nine members who traverse specific groupings provided for by the Treaty. He submitted that, since the number of possible and prospective persons who could fill those nine seats far exceeds the number of the seats, the emphasis should be on the words "as much as it is feasible." He then prayed that the Court should find that the persons who were sent to the EALA were as diverse as can be and to that extent, this Court should find that there was conformity with the Treaty.
67. Counsel further contended that no person from the various political groups and or special interest groups were ever barred directly or indirectly from engaging in the nomination process to contest for the election to the EALA. He strongly contended that the 2012 Rules of Procedure provide for an all-inclusive representation of members, which was and is in substance consistent with the provisions of Article 50(1) of the Treaty. It is his submission that the impugned Rules must be interpreted as being in substance consistent with Article 50(1) of the Treaty in view of the mischief of the 2006 Rules of the Procedure which the 2012 Rules sought to correct.
68. In the same vein, Counsel prayed that the Court should find from the wording of the Rules that, every Ugandan who wanted to participate in the elections was free to be nominated, the emphasis being on the vote that is a legislative issue, which should be left to the Parliament of Uganda as an Electoral College. He further asserted that the process should not be manipulated in such a way that certain persons are granted slots or quotas as the Applicant seems to insist on.
69. In conclusion, Counsel invited this Court to find that Rule 13(1) and (2) are substantively consistent with the provision of Article 50(1) of the Treaty and to answer the issue in favour of the 1st Respondent.
    Mr. Kaahwa did not submit on this issue.
70. Counsel for the Interveners associated himself with the 1st Respondent and argued that the 2012 election Rules were lawfully enacted by the Parliament of Uganda within its discretion under, and in compliance with Article 50 (1).
71. In support of his assertion that the enactment of the 2012 Rules of Procedure and that the electoral process were conducted in conformity with the provisions of the Treaty, Counsel relied on three cases, namely, *Anyang' Nyong'o case, Mbidde case and Hon.*

*Jacob Oulanyah case (supra)*.

72. The rest of his submission dealt with matters pertaining to whether the nine interveners were duly elected by the Parliament of Uganda. He barely elaborated on the issue whether the impugned Rules were or not an infringement of Article 50(1) of the Treaty.

**Decision of the Court on Issue No.2**

73. It is not in dispute that the Parliament of the Republic of Uganda passed the Rules of Procedure for the election of members of the EALA on 18th May 2012 and these Rules are part of the new Rules of Procedure of Parliament of Uganda, 2012. The provisions of those Rules falling under this Reference are Rule 13 on Election of members of the EALA and Rule 13(1) and (2) of Appendix B to the Rules of Procedure.

    For clarity's sake, we reproduce the said Rules:

    "Rule 13: Election of Members of the East African Legislative Assembly

    (1) The nine members of the East African Legislative Assembly representing Uganda shall be elected by Parliament not from among members of Parliament, representing as much as feasible, the various political parties represented in the House, shades of opinion, gender and other special interest groups in Uganda.

    (2) The election of the members to the East African Legislative Assembly shall be held in accordance with the rules set out in Appendix B to the Rules."

    Rule 13(1) and (2) of Appendix B provides as follows:

    "Rule 13: Election of Members of the Assembly:

    (1) The election of members to the Assembly representing the various political parties and organizations represented in Parliament, shades of opinion, gender and other special interest groups in Uganda shall be conducted after consultation and consensus by the political parties and other Members of Parliament.

    Subject to sub rule (1), the Speaker shall, where consensus is not reached put the matter to vote."

74. The issue we have to decide on is whether the 2012 Rules of Procedure, particularly Rule 13(1) and (2) are in substance inconsistent with the Treaty, specifically Articles 23(1), 27(1), 38(1) and 50(1).

    The essential requirements for election rules to conform to Article 50(1) have been well articulated by this Court in the pre-cited *Mbidde case*. We have elsewhere reproduced these requirements above.

75. It is our view that in order to conform to the provisions of Article 50(1), the election Rules must enable the establishment of an electoral process that ensures equal opportunity to become a candidate, full participation and competition for specified groupings and at the end of the process, their effective representation in the EALA.

76. We agree with Counsel for the 1st Respondent that Rule 13 which specifically deals with the election procedure "mirrors" the wording of Article 50 of the Treaty and we have no doubt that the impugned Rule 13(1) and (2) does not allow sitting members of the Parliament of Uganda to run for election for position in the EALA.

77. Further, according to the Hansard of the Parliament of Uganda dated 15th, 17th, 22nd, and 30th May 2012 and other documents annexed to the 1st Respondent's Affidavit in support of the Reference filed on 16th August 2012 by Mrs. Jane L.

Kibirige, Clerk to Parliament of the Republic of Uganda, ample details are provided on the process for the enactment of the new Rules and how the electoral process (advertisement on elections, picking nomination forms, submission of nominees, setting up of the verification Committee and voting) was conducted pursuant to the new Rules of Procedure.

78. As indicated in the said Hansard and evidenced by the aforementioned Affidavit and not denied by the Applicant, a total of seventeen nominees from various political parties and other special interest groups were presented to the Parliament of Uganda constituted as an Electoral College and nine of them were elected to the EALA.
79. It is also our view that, contrary to the Applicant's assertion, there is no requirement to be deduced from Article 50(1) of the Treaty that the said election rules should provide for specific slots for the interest groups set out in the Article or that they should provide for guarantees of representation, specifically of women, youth and persons with disabilities or any specified grouping provided for by Article 50(1) where such representation is not "feasible." This Court is not clothed with the jurisdiction to determine such feasibility which is, in any event, left to the discretion of the National Assemblies of Partner States.
80. Further, as it was recently decided by this Court in *Abdu Katuntu Vs The Attorney General of Uganda & The Secretary General of the East African Community & 9 Interveners, Ref. No. 5 of 2012*, p. 29, that:
"while Article 50 provides for the National Assembly of each Partner State to elect nine members of the EALA, it gives no directions on how the election is to be done, except for the stipulation that the nine must not be elected from members of the National Assembly and as much 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 as was held in the *Anyang' Nyong'o case* that: '... 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 feasibility of such representation is left to be determined in the discretion of the National Assembly.'
81. This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. Here, we take judicial notice of the fact that the number of political parties in the Partner States differ from one State to another. In some of them, there are more than a dozen political parties, namely, Kenya and Tanzania. In our view, this explains why the framers of the Treaty in their wisdom, for the purposes of uniformity for all the Partner States used the word 'various' to allow for the diversity in their circumstances."
82. While the holding above specifically refers to political parties, our view is that the same applies to other specified groupings provided for under Article 50(1) of the Treaty as well.
Regarding the issue of consultations and consensus as envisaged by Rule 13(1) and (2) of Appendix B of the impugned Rules, it is important to note that the said Rule flows from Rule 13 of the Rules of Procedure. The latter Rule is itself a creature of Article 50(1) of the Treaty, which obliges National Assemblies of Partner States to determine the procedure for election of EALA members.

83. We have also carefully perused Appendix B of the Rules of Procedure and it has the following provisions:
    I. The procedure The creation of a Verification Committee – Rules 8, 10 and 11;
    II. Campaigns by nominated candidates – Rule 12 (1);
    III. Voting by secret ballot for nomination of candidates – Rules 3, 4, 5 and 6;
    IV. – Rule 12(2);
    V. Declaration of the results of election – Rule 14;
    VI. Publication in the Gazette – Rule 15;
    VII. Transmission of names of elected members to the Secretary General of the East African Community – Rule 16.
84. Rule 13(1) and (2) of Appendix B aforesaid provides for consultations and consensus in the elections of members to the EALA. This Rule is located between the provisions on voting by secret ballot in Rule 12 and declaration of results in Rule 14. It is unclear to us and no explanation was offered by the 1st Respondent why such procedure should exist at such a crucial stage of the electoral process. We say so because, in any election, consultations and consensus-building are done in the earliest stages of the electoral process and certainly not after voting. Therefore, any provision that imposes consultations and consensus after voting is unusual.
85. Further, it is our view that any attempt by the Rules to tamper with the smooth conduct of the electoral process as envisaged by Article 50 of the Treaty and as articulated in the *Anyang' Nyong'o case* and in the *Mbidde case* would amount to a clear violation of the said Article.
86. We are alive to the fact that in the *Katuntu case*, this Court noted that the specific prayer in issue was whether all the six political parties represented in the Parliament should be guaranteed a representation in the EALA by the Rules of Procedure. This Court held and as it has also held above that no such a guarantee exists for all political parties represented in Parliament or any other group specified in Article 50(1).
87. Before we depart from this issue, we would like to reiterate that in the interpretation of the Treaty, we are guided by the Vienna Convention on the Law of Treaties, Article 31(1) which 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."
88. Applying the above principle and based on the facts set out herein, it is clear to us that, Rule 13 and the rules in Appendix B, save for Rule 13 (1) and (2), in substance, meet the benchmark set out in Article 50 (1) of the Treaty. Rule 13 of Appendix B as found above is alien to both the spirit and requirements of Article 50(1) of the Treaty.
89. Although the Applicant adduced no evidence that the impugned Rule 13(1) and (2) of Appendix B was used in the last EALA elections, we are of the view that the impugned Rule if left in the Rules of Procedure, can derail the electoral process. In that regard, we shall make an appropriate order in this Reference.
    Accordingly, the answer to issue No. 2 is that the Rules of Procedure save for Rule 13(1) and (2) of Appendix B, are in substance, consistent with the Treaty provisions.
    Issue No. 3: Whether or not the Rules were gazetted and if not, whether the failure to gazette rendered them null and void

**Submissions**

90. The Applicant's Counsel submitted that the Rules of Procedure were never gazetted as required by the law, while stating that what was published was only a General Notice. He further asserted that the law on the requirement of gazetting the rules stems from Section 16 of the Interpretation Act, Cap 3, Laws of Uganda and that gazetting being a mandatory requirement, failure to do so renders the Statutory Instrument null and void.
91. It is also his submission that the requirement for gazetting the Rules of Procedure for election of members of EALA 2012 is even more profound and critical in view of the intended beneficiaries, that is, the persons falling in the categories specified in Article 50(1) of the Treaty, who were interested in seeking nomination and election as members of the EALA. He prayed that the Court makes a finding that the Rules of Procedure for election of members of the EALA, 2012 are null and void for want of due publication in the Gazette.
92. Learned Counsel contended that the said Rules were sufficiently gazetted as required by the law. He further asserted that there is no express and mandatory provision as to the form (whether by a notice or Legal Supplement) by which the said Rules are to be published under the 1995 Constitution of the Republic of Uganda, the Interpretation Act, Cap 3 and or the Rules of Procedure of the Parliament of Uganda, 2012. Mr Kaahwa did not submit on this issue.

    Counsel for the Interveners associated himself with the 1st Respondent's Counsel and contended that the Rules were sufficiently gazetted as required by the law in Uganda.

**Decision of the Court on Issue no. 3**

93. As the issue stands and according to the submissions of Counsel for the Applicant, the latter seeks a declaration that no valid Rules of Procedure for the election of members of the East African Legislative Assembly, 2012 were passed by the Parliament of Uganda since they were not duly gazetted, and that therefore, the said Rules are null and void.
94. Both Counsel for the Applicant and the 1st Respondent have indicated in their respective submissions that the matter of gazetting laws and rules after their enactment by the Parliament is governed by relevant Ugandan laws, mainly the Constitution of the Republic of Uganda and the Interpretation Act, Cap 3. It goes without saying that, consequently, the competent Ugandan institutions provided for by the said laws should resolve questions arising out of this matter.
95. The Court therefore, declines the Applicant's invitation to determine this issue, which, manifestly, falls outside its jurisdiction as provided for by Articles 23 and 27 as read together with Article 30 of the Treaty.

    Issue No .4- Whether in view of the Court's finding on issues 2 and 3, any acts, decisions made or elections conducted by the Parliament or Government of Uganda pursuant to the Rules are null and void.

**Submissions**

96. The Applicant's Counsel invited the Court to interpret Article 50(1) of the Treaty to determine the Applicant's contention that the impugned Rules are a nullity and

inconsistent with the Treaty for the reasons given in his submissions on issues 1 and 2.

97. On the contrary, Counsel for the 1st Respondent reiterated his submissions made under issues 2 and 3, and maintained that the Rules of Procedure for the election of members of the EALA are substantially consistent with the provisions of Article 50(1) of the Treaty. He further contended that since the said Rules were duly gazetted and considering his submissions on issues 2 and 3, all the acts and elections carried out under the impugned Rules were and are valid.
Mr. Kaahwa did not submit on this issue.

98. For his part, Counsel for the Interveners contended that under Article 52 of the Treaty, this Court is not vested with the jurisdiction to entertain issues relating to the election of members of the EALA since those matters are reserved to the National Assemblies of Partner States. He then referred the Court to *Anyang' Onyang'o and Mtikila cases* in support of his stance.

**Decision of the Court on Issue No. 4**

99. In light of our findings on issue No. 2, we reiterate our decision that the Rules of Procedure for election of members of the EALA, save Rule 13(1) and (2) of Appendix B, were in substance consistent with the provisions of Article 50(1) of the Treaty. As for issue No. 3, we have resolved that it did not fall under the jurisdiction of the Court under Articles 23 (1) and 27(1) as read together with Article 30 of the Treaty. Furthermore, guided by the said Articles as read together with Article 52 of the Treaty, we restate our view that, matters raised under issue No.4 revolve around the election of members of the EALA conducted by the Parliament of Uganda and therefore, questions related thereto are within the ambit of Article 52 of the Treaty and have to be dealt with by the competent institution of the Republic of Uganda. Under the Ugandan law, that jurisdiction is reposited in the High Court of Uganda.
For the above reasons, we answer issue No.4 in the negative.
Issue No. 5 Whether the parties are entitled to the remedies sought

100. Counsel for the Applicant contended that the Applicant is entitled to the remedies sought.
Counsel for the 1st Respondent, on his part, asserted that the Applicant is not entitled to the reliefs sought in the Reference.

101. The 2nd Respondent's Counsel brought to the Court's attention the matter of cause of action and invited the Court to establish whether or not he is the proper party before the Court. Relying on authorities, namely, *P.C. Mogha, The Law of Pleadings in India (Eastern Law House, Calcutta 1989); N.S. Brindra's Pleadings and Practice (8th ed), Allahabad 1997; Mulla: The Code of Civil Procedure, (16th ed) by Solil Paul and A. Srivastava; EACJ Appeal No. 1 of 2011: The Attorney General of the Republic of Kenya Vs Independent Medical Legal Unit and EACJ Appeal No. 4 of 2012: Legal Brains Trust (LBT) Limited Vs The Attorney General of the Republic of Uganda)*, he asserted that the matters before the Court in the Applicant's case do not evince or show a cause of action envisaged under the Treaty to necessitate proceedings against him. He then pointed out that it is only in her submissions that the Applicant alleged that the 2nd Respondent violated the Treaty. He asserted that the Applicant's conduct,

which is a violation of Rule 38 prejudiced him and took him by surprise since it denies him the chance to respond to such allegations in his pleadings. In support of his stance that parties are bound by their pleadings and that the Court cannot grant relief that had not pleaded, he referred the Court to Interfreight Forwards (U)Ltd Vs East African Development Bank [1009-1994] EA 117, 125, Order JSC and Captain Harry Vs Caspar Air Charters Limited [1956] EACA 139, 140.

102. It is his submission that given the chronology of actions vigilantly taken by the 2nd Respondent within his lawful province of duty, which actions have not been contested, no failure on his part can be alleged as far as the process of election of the EALA by the Parliament of Uganda is concerned (see *Mbidde case*).

103. He invited the Court to take note of the fact that given his role and taking into account the relevant provisions of the Treaty, the Constitution of the Republic of Uganda and the Parliament Elections Act of Uganda, he had no cause whatsoever, right obligation to take any cause of action other than the one he took. He therefore submitted that the Applicant was not entitled to any remedy sought against the 2nd Respondent and that the Court should dismiss the Reference against him with costs.

104. With regard to declarations and orders sought by the Applicant, the Interveners' Counsel submitted that the *Mbidde case* has examined the law on declaration and invited the Court to take into account the Court's findings in that judgment.

105. Learned Counsel further submitted that EALA members were already sworn in and the Assembly has been in place since the elections were held and that the doctrine of prospective annulment applies in such a situation, referring the Court to *Calist Mwatela & 2 others Vs EAC, Application No. 1 of 2005*.

106. It is also the Counsel's submission that the recognition of elected members of the EALA is a function of the law as provided under the Treaty and the Rules of Procedure. That, given the chronology of actions taken by the 2nd Respondent within his lawful province of duty, and contrary to the Applicant's assertions in his pleadings, the 2nd Respondent was bound by the Treaty and the Rules of Procedure to take cognizance of the election of all members of the EALA as duly communicated to him.

107. Mr. Semuyaba further submitted that, following the developments in the Parliament of the Republic of Uganda and in the absence of any challenge of elections of members of the EALA or any other impediment, the 3rd EALA with duly elected members from all the Partners States was constituted on 5th June 2012.
Counsel therefore asserted that the Applicant was not entitled to the reliefs sought in the Reference and prayed that the same be dismissed with costs.

**Decision of the Court on Issue No. 5**

108. From the pleadings and the submissions, the Applicant seeks declarations and orders:
   a) "That the said Rules of Procedure for election of members of the EALA 2012 are null and void;
   b) That the said Rules are inconsistent with or otherwise an infringement of the provisions of Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty;
   c) That the nomination and subsequent election of the members of the EALA by

the Parliament of Uganda conducted under or in pursuance of the said Rules is not only unlawful but an infringement of the Treaty and therefore ought to be set aside;

d) That the 2nd Respondent ceases to recognize the persons elected by the Parliament of Uganda to the EALA;
e) That the 1st Respondent be ordered to cause the enactment of Rules of Procedure for the Election of members of the EALA that are in conformity with Article 50(1) of the Treaty;
f) That an order that fresh nominations and elections of the EALA members from Uganda be conducted under proper Rules of Procedure; and
g) That the Respondents be ordered to pay the costs of the Reference."

109. We have considered Counsel's submissions and taken into consideration the pleadings and evidence on record. In light of our findings and conclusions on the issues herein, we make the following declarations and orders:

1. Prayers (a), (b) and (e) are disallowed, save for our findings with regard to Rule 13 (1) and (2) of Appendix B of the 2012 Rules of Procedure. Consequently, the Court orders the 1st Respondent to cause the amendment of Rule 13 (1) and (2) of Appendix B of the 2012 Rules of Procedure to bring it into conformity with Article 50(1) prior to the next EALA elections.
2. Prayers (c), (d) and (f) are disallowed.
3. On costs, the Applicant has partially succeeded and shall be awarded a quarter of the taxed costs to be borne by the 1st Respondent.

Conclusion

4. In conclusion, the Reference is determined in the above terms. The Applicant shall be awarded a quarter of the taxed costs to be borne by the 1st Respondent

It is so ordered.

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East African Court of Justice- First Instance Division
Reference No. 7 of 2012

**Antony Calist Komu And The Attorney General of the United Republic of Tanzania**

Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, Faustin Ntezilyayo,
September 26, 2014

*Categories of contestants in EALA elections- Proportional Representation - Political parties not guaranteed representation in EALA - Preliminary Rulings of national courts - Special interest groups- The principle of res sub-judice- Whether, the Parliament of the United Republic of Tanzania violated the Treaty in its formulation of groups of categories of contestants – Whether the official Opposition Party in Parliament had an automatic chance of representation in EALA.*

*Articles 6(d), 7, 8, 23, 27, 30, 33,34 and 50 of the Treaty - Rules 1(2) and 24 of this EACJ Court's Rules of Procedure, 2010- Rule 5(5) East African Legislative Assembly Election Rules , 2007(Tanzania) - Order No.12 , The Parliamentary Standing Orders (Tanzania).*

The United Republic of Tanzania enacted, the East African Legislative Assembly Election Rules in 2007 pursuant to Article 50 of the Treaty and Standing Order No. 12 of the Parliamentary Standing Orders. Rule 5(5) thereof provided for criteria by which Political Party which is entitled to sponsor candidates, were to submit names. This included three groups: Women; Zanzibar; Opposition Parties; and Tanzania Mainland.

The Applicant, Antony Calist Komu was a member of *Chama Cha Demokrasia na Maendeleo (CHADEMA)*, an opposition political party in the United Republic of Tanzania. In that capacity, he had sought election as a representative of Tanzania to the East African Legislative Assembly in an election conducted in the National Assembly of Tanzania on 17th April, 2012. Unsuccessful in his bid, the Applicant filed Petition No.1 of 2012 in the High Court in Dodoma, Tanzania challenging the election of certain persons to the EALA.

On 15th June, 2012, he filed the present Reference to challenge the said election on grounds *inter alia*, that in conducting the said election, the National Assembly of Tanzania violated Article 50 of the Treaty. The Applicant also averred that TADEA, a Political party the had norepresentation in the National Assembly was allowed to field a candidate in violation of the rules .

The Respondent contented that the Reference lacked merit and was *sub-judice*.

**Held:**

1) The fact that there was a petition pending at the High Court in Dodoma did not oust

the jurisdiction of the Court. Even if the Parties in both the Petition pending before the High Court and the Reference may be the same, and the election of 17th April 2012 may be the general subject matter of both cases, the competence of the two Courts would exclude the principle of res *sub-judice*. Furthermore, none of the two Courts had conclusively determined any aspect of the subject matter of the present dispute. Whether or not the national Court had invoked Article 34 of the Treaty, made no difference as the Reference raised triable issues that were properly within the mandate and jurisdiction of the EACJ.

2) Rule 5(5) of the Election Rules created political parties as the sole basis for an election under Article 50. All other categories such as gender, special interest groups and shades of opinion were subsumed into this single category. The categorization creating slots for opposition political parties, generally, and Tanzania Mainland under that larger categorization was a violation of Article 50(1) of the Treaty.
3) To the extent that the election of members of the East African Legislative Assembly conducted by the National Assembly of Tanzania on 17th April, 2012 was premised on only political parties as the sole grouping as opposed to all the other groups envisaged in Article 50(1) of the Treaty then, the further creation of other categories violated the said Article.
4) The application of the principle of proportional representation in Standing Order No. 12 and thereafter its execution in rule 5(5) does not flow from the language, tenor and spirit of Article 50(1) of the Treaty.
5) It would defeat the whole purpose of an election to guarantee the outcome thereof. Thus no group under Article 50(1), including an opposition political a party, is guaranteed representation in the EALA.
6) The National Assembly of Tanzania violated Article 50(1) of the Treaty by allowing TADEA, a political party without representation in the National Assembly to field a candidate in the election of 17th April, 2012 for representatives to the EALA.

**Cases cited:**
Abdu Katuntu v. Attorney General of Uganda, Reference No. 5 of 2012
Christopher Mtikila v. AG of Tanzania and Others, EACJ Reference No.2 of 2007

**Judgment**

**Introduction**

1. The Applicant, Antony Calist Komu (hereinafter "the Applicant") is a member of Chama Cha Demokrasia na Maendeleo (CHADEMA), a political party in the United Republic of Tanzania (hereinafter "Tanzania"), a Partner State within the East African Community (hereinafter the "EAC"). In that capacity, he had sought election as a representative of Tanzania to the East African Legislative Assembly (hereinafter "EALA") in an election conducted in the National Assembly of Tanzania on 17th April, 2012. He was unsuccessful in his bid and on 15th June, 2012, he filed the present Reference to challenge the said election on grounds *inter alia*, that in conducting the said election, the National Assembly of Tanzania violated Article 50 of the Treaty for the Establishment of the East African Community (hereinafter "the

Treaty").

2. The Reference is premised on the provisions of Articles 6(d), 7, 8, 23, 27, 30, 33 and 50 of the Treaty, Rules 1(2) and 24 of this Court's Rules of Procedure as well as the Vienna Convention on the Law of Treaties.
3. It is supported by the Hansard Report of the Parliament of Tanzania for 17th April, 2012, the Witness Statement dated 3rd October, 2013 and oral evidence of the Applicant, the Witness Statement dated 4th October, 2013 and oral evidence of John Mnyika, a counter Affidavit sworn on 22nd November, 2013 by the Applicant and Affidavits sworn on 4th October, 2013 and on 19th November, 2013 by Edson Mbogoro, Learned Counsel for the Applicant. A reply to the Response by the Respondent was also filed on 17th March, 2013.
4. The Respondent is the Attorney General of Tanzania and in opposition to the Reference, he filed a Notice of Preliminary Objection dated 26th February, 2013, accompanied by his substantive response to the Reference. On 1st November, 2013, he filed an Affidavit sworn on 31st October, 2013 by Thomas Didimu Kashililah, Clerk of the National Assembly of Tanzania and on 1st November, 2013, he filed another Affidavit sworn on 31st October, 2013 by Oscar Godfrey Mtenda, Chief Parliamentary Legal Counsel in the National Assembly of Tanzania.
5. Both Parties also filed written submissions in support of their rival positions in the Reference.

**Representation**

6. Mr. Edson Mbogoro represented the Applicant while Mr. Obadiah Kameya and Mr. Mark Mulwambo represented the Respondent.

**Factual background**

7. From the pleadings filed by the Parties, it is the manner in which the process envisaged under Article 50(1) of the Treaty was undertaken by the National Assembly of Tanzania on or prior to the 17th April, 2012 that is the subject of this Reference. That Article provides that:

   "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 special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine."

8. The issues arising from the election of Tanzania's representatives to EALA on 17th April 2012, pursuant to the above provision will shortly become apparent.

**The Applicant's Case**

9. The Applicant, in his Reference and in all the supporting pleadings elsewhere mentioned above, has set out his case as here below: Firstly, that during the election for Tanzania's representatives to the EALA, the Speaker of the National Assembly of Tanzania conducted the election in four categories of representation contrary to the express provisions of Article 50(1) of the Treaty. Those categories were:

i. Group A - Women
ii. Group B - Zanzibar
iii. Group C - Opposition Political Parties
iv. Group D - Tanzania Mainland.

10. Secondly, that had the proper formulae been applied, the Applicant, as the sole candidate offered for election by his political party of choice, CHADEMA, would have been elected to the EALA but instead the skewed Rules ensured that he was not elected and candidates offered by smaller parties like Civic United Front (CUF) and NCCR – Mageuzi were elected instead.
11. Thirdly, during the election, Article 50 was further violated when a political party, Tanzania Democratic Alliance (TADEA) was allowed to field a candidate while it had no representation at all in the National Assembly.
Fourthly, that a proper interpretation of Article 50 as read with this Court's decision in the *Anyang' Nyong'o Case* (i.e. *Anyang' Nyong'o & others vs. AG. of Kenya and Others, Ref. No.1 of 2006*), would have led to the following formulae of elections to the EALA:

i. Group A - Gender (specifically women)
ii. Group B - Zanzibar
iii. Group C - Official Opposition Political Party
iv. Group D - Other Opposition Political Parties
v. Group E - Tanzania Mainland

Oral Evidence Tendered by the Applicant

12. It is important to note at this stage that the Applicant tendered oral evidence and was cross-examined by Counsel for the Respondent and also called one witness, John Mnyika, the Member of Parliament for Ubungo Constituency and Director of Information and Publicity for CHADEMA, in support of his case.
13. While the Applicant in his oral evidence largely reiterated his case as summarized elsewhere above, John Mnyika went further to clarify the basis for the proposition that CHADEMA was entitled to representation in the EALA. His evidence in that regard was that CHADEMA has 49 Members in the National Assembly of Tanzania while Chama Cha Mapinduzi (CCM) has 258 Members and CUF has 36 Members and therefore, in his view and in CHADEMA's view, their representation in EALA ought to be mathematically calculated at 14%, 74% and 10%,respectively, so that:
    i. CHADEMA would have one (1) member in EALA;
    ii. CCM would have seven (7) Members and,
    iii. CUF would have one (1) Member.
14. It is instructive to note that Tanzania, like all other EAC Partner States, is entitled to nine (9) members in the EALA and so according to him, the above formulae would cater for all political parties in order of their numerical strengths in the National Assembly. In addition and to meet the gender and other criteria set out in Article 50(1) of the Treaty, Mnyika's evidence was that since CCM would have been entitled to seven (7) members under the above proposal, then it was up to CCM to ensure that those other groups and categories are catered for in the quota allocated to it. It would seem therefore that his position and that of the Applicant is that all those other categories and groups would somehow find representation in CCM prior to and

during the election as opposed to having their distinct and separate representation at the election and later at the EALA.

15. He also explained what efforts he had made within the National Assembly to have the above proposal passed but he was unsuccessful hence his support for the orders sought in the Reference.
    i. Lastly, it was the Applicant's submission that for all the above reasons, the following orders should be granted in his favour : Declaration that the election for Members of the East African Legislative Assembly conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the Treaty for the Establishment of the East African Community;
    ii. Declaration that in obtaining the representatives from Groups C and D, Article 50 of the Treaty for the Establishment of the East African Community envisages, *inter alia*, the observance and compliance of the principle of proportional representation;
    iii. Order prohibiting the Parliament of Tanzania from further violation of Article 50 of the Treaty for the Establishment of the East African Community by not complying with the principle of proportional representation and allowing candidates from political parties which are not represented in the National Assembly to contest in the said election; and
    iv. Order that the costs of this Reference be made by the Respondent".

**The Respondent's Case**

16. The Respondent, from the outset and by his Notice of Preliminary Objection seeks that the Reference should be struck off on the grounds that:
    i. It is frivolous, vexatious and an abuse of Court process;
    ii. It is wrongfully before this Court and is contrary to the Rules of Procedure of this Court; and
    iii. It is without merit and should be dismissed for being res *sub-judice*.
17. In submissions, Counsel for the Respondent argued that the Reference is frivolous, vexatious and an abuse of Court process because, instead of applying for the High Court in Dodoma to refer the dispute before it in Petition No.1 of 2012, on the same subject matter, for a preliminary ruling of this Court under Article 34 of the Treaty, the Applicant ignored that procedure and filed the present Reference. That the said action, it is urged, amounts to a deliberate disregard of the Law and this Court's Procedures.
18. As to whether or not the Reference is improperly before the Court, the Respondent's submission is that the copy of the Hansard of the National Assembly annexed to the Reference was illegally obtained and should not be used in these proceedings. In that regard, that without any proper document to support it, then the Reference is not properly before the Court and should be struck off.
19. Regarding the Claim of res *sub-judice*, it is the Respondent's case that Petition No.1 of 2012 aforesaid had a prayer to the effect that a declaration should be made that Article 50 of the Treaty had not been complied with in the elections to the EALA and since the same prayer has been replicated in this Reference, then the doctrine of res *sub-judice* must be invoked and the Reference struck off.

20. The Respondent in the alternative seeks that the Reference should be dismissed for lack of merit because:
    i. Firstly, the operative words in Article 50(1) are "as much as is feasible" in ensuring the representation set out therein. Further, that, in interpreting the said Article, the National Assembly of Tanzania considered that for there to be"feasibility", the four categories created under Rule 5(5) of the EALA Election Rules should be the basis for the election and that the said categories are, in his view, lawful within the meaning of Article 50(1) aforesaid and the interpretation given to it by this Court in *Anyang' Nyong'o (supra)*;
    ii. Secondly, that "proportional representation" in the unique context of Tanzania was neither possible nor practical because of the necessity to bring on board Zanzibar as a special interest category and conversely, the Official Opposition Political Party could not be considered a separate category or special interest group as opposed to other opposition political parties;
    iii. Thirdly, the fact that TADEA fielded a candidate for election was within the provisions of the EALA Elections Rules as every opposition political party was entitled to do so under those Rules;
    iv. Fourthly, that CHADEMA had the opportunity to field three candidates in every category in the election, but it chose to field only one candidate in the entire election and when the candidate was unsuccessful in his bid, then such failure cannot be attributed to non-compliance with Article 50(1) of the Treaty; and
    v. Fifthly, an election is not akin to a nomination and no candidate in a contested election is assured of an automatic election. In that regard, the Applicant's assumption that, as the sole candidate offered by CHADEMA to contest the EALA election, then he was assured of being elected, was a misplaced assumption not backed by reality and the Law.

    For the above reasons, the Respondent prays that the Reference should be dismissed with costs.

**Applicant's response to the preliminary objection**

21. The Applicant in answer to the Notice of Preliminary objection filed by the Respondent stated that:
    a) The Reference was neither frivolous, vexatious nor an abuse of Court process and in the context of the definition of those words in the *Black's Law Dictionary, 5th Edition*, the Respondent's submission in that regard was misguided. In any event, that the Applicant has shown a sufficient interest in the matter at hand and the decision of the Court, if made in his favour, would assure that in future elections to the EALA, Tanzania would ensure that the Ruling Political Party does not abuse its majority numbers in Parliament to the detriment of the Official Opposition Political Party; and
    b) The Reference is properly before the Court and the submission to the contrary is vague and does not disclose what provisions of the Law have been violated and in any event, the objection as framed in submissions is not a pure point of law and cannot pass the threshold of a preliminary objection as expressed in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E. A 696 per*

*Sir Newbold*.

22. The argument made in that regard is that whereas a copy of the Hansard of the National Assembly was obtained and filed in this Court without the special leave of the Assembly under section 19(1) of the Parliamentary Immunities, Powers and Privileges Act, Cap.296 Laws of Tanzania, even if that Hansard were to be expunged from the record, the Reference, premised on other independent evidence, would still stand.
23. On the question whether the Reference is barred by the doctrine of res *sub-judice*, quoting S.10 of the Indian Civil Procedure Code and Sarkar's Law of Civil Procedure, 8th Edition, Vol.1 at page 46, Counsel for the Applicant submitted that, looking at the prayers in Petition No.1 of 2012 in the High Court at Dodoma vis-à-vis the present Reference, it is clear that in the two suits, the only common issue is that the previous suit is still pending before the High Court aforesaid. Further, it is urged that, contrary to the Respondent's assertion, the High Court at Dodoma has no jurisdiction to interpret the Treaty and is therefore an incompetent Court in that regard and in any event, that the reliefs sought in both cases "are worlds apart".
24. The Applicant, for the above reasons, is therefore of the firm view that the Preliminary Objections are without merit and should be overruled.

**Scheduling Conference**

25. At the Scheduling Conference held on 6th September, 2013, Parties agreed on the following issues:
    i. That the Parliament of the United Republic of Tanzania held election of Members of the East African Legislative Assembly on the 17th day of April 2012 and the Claimant participated in the election as a contestant but was unsuccessful;
    ii. According to Article 50 of the Treaty for the Establishment of the East African Community, the election of contestants to the East African Legislative Assembly should have representation as much as it is feasible from 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;
    iii. The procedure that was adopted by the Tanzanian Parliament in conducting the said elections was by creating four categories of representation namely:
        a) Group A - Gender
        b) Group B - Tanzania Zanzibar
        c) Group C - Opposition Political Parties
        d) Group D - Tanzania Mainland
    iv. That the Claimant contested through Group C which was meant for Opposition Political Parties; and
    v. One contestant, a member from TADEA, a political party contested under Group D - Tanzania Mainland.

**Points of Disagreement/Issues for Determination**

i. Whether or not the Reference before this Court is frivolous, vexatious and an abuse of the Court process;
ii. Whether or not, the Reference is wrongfully before this Court and is contrary to the Rules of Procedure of the Court;
iii. Whether or not, the Reference has no merit and should be dismissed for being res *sub-judice*;
iv. Whether or not, the Parliament of the United Republic of Tanzania violated Article 50 of the Treat for the Establishment of the East African Community by formulating groups of categories for contestants namely:
    a) Group A - Gender
    b) Group B - Tanzania Zanzibar
    c) Group C - Opposition Political Parties
    d) Group D - Tanzania mainland
v. Whether or not, the election of Members of the East African Legislative Assembly on the basis of groups C and D categories violated the Principle of Proportional Representation as provided for under Article 50 of the Treaty for the Establishment of the East African Community;
vi. Whether or not, the failure of CHADEMA to get a single representative in the East African Legislative Assembly was caused by non-compliance with Article 50 of the Treaty for the Establishment of the East African Community;
vii. Whether or not, Article 50 of the Treaty for the Establishment of the East African Community provides a right for representatives of the Official Opposition Party in Parliament to an automatic chance of representation in the East African Legislative Assembly; and
viii. Whether or not, the Parties are entitled to the remedies sought.

**Determination**

26. We have considered the matter in the context of the pleadings and submissions made by both Parties and we find it prudent to begin by addressing the three issues raised in the Notice of Preliminary Objection filed together with the Response to the Reference by the Respondent. Those issues are in any event issues Nos. I, II, and III in the points of disagreement and which we are required to determine.
    Issue No.1: Whether or not the Reference before this Court is frivolous, vexatious and an abuse of the Court process:
27. The Respondent has urged the point that because the Applicant filed a separate suit at the High Court in Dodoma (*Petition No. 1 of 2012*), then he had alternative remedies available to him in that Court and he ought not to have filed the instant Reference. Further, that he should only have approached this Court by way of a preliminary ruling under Article 34 of the Treaty.
28. On our part, we deem it fit to look at the Reference holistically. In doing so, it is obvious to us that the Reference is primarily based on an interpretation of Article 50 of the Treaty and whether the election conducted in the National Assembly of Tanzania on 17th April 2012 met the expectation and the threshold created by that Article.

29. That issue is certainly not frivolous, vexatious nor an abuse of Court process because under Article 27 of the Treaty, it is the mandate of this Court to interpret and apply the Treaty in matters placed before it for determination.
30. As regards the issue whether any person was properly elected under Article 50 aforesaid, Article 52 of the Treaty provides as follows:
    "1) 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 institutions for the Partner State that determines questions of the election of members of the National Assembly for the election in question; and
    2) The National Assembly of the Partner States shall notify the Speaker of the Assembly of every determination made under paragraph 1 of this Article."
31. The Applicant, it is obvious to us, filed Petition No.1 of 2012 at the High Court in Dodoma to challenge the election of certain persons to the EALA pursuant to the above Article. The Reference on the other hand challenges the interpretation given to Article 50(1) of the Treaty by the National Assembly in promulgating Rules to govern the conduct of an election under that sub-Article as opposed to the election per se and this can be seen from the prayers in the Reference which have been set out above.
32. The Reference is also only one in a long series that this Court has had to determine in similar circumstances. In *Christopher Mtikila vs. AG of Tanzania and Others, Reference No.2 of 2007*, for example, this Court declined to entertain and instead opted to strike out the Reference and in doing so, partly stated as follows:
    "We are at one with Mr Mwalimu 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 substitution of the 3rd interveners for the said four Claimants, this Court would have no jurisdiction over the Reference.'
33. 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.
    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."
34. We agree with the above holding and would only add that the fact that there is a petition pending at the High Court in Dodoma would not by that fact alone oust the jurisdiction of this Court and whether or not that Court had invoked Article 34 of the Treaty, would have made no difference in that regard.
    Article 34, for avoidance of doubt, provides that:
    "Where a question is raised before any court or tribunal of a Partner State concerning

the interpretation or application of the provisions 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 give judgment, request the Court to give a preliminary ruling on the question."

35. While the High Court at Dodoma has not sought any preliminary ruling on any question placed before it pursuant to the above Article, we are certain that the Reference as framed and argued, raises triable issues properly within the mandate and jurisdiction of this Court and is therefore neither frivolous and vexatious nor an abuse of the Court process, as argued by the Respondent.
We accordingly overrule this limb of the Preliminary Objection.
Issue No.2: Whether or not, the Reference is wrongfully before this Court and is contrary to the Rules of Procedure of this Court:
36. The issue arising here is whether the Hansard of the National Assembly of Tanzania was unlawfully procured and whether it can form part of the evidence to be considered by this Court.
37. We shall take very little time with this issue because whereas there is no evidence that the Applicant obtained leave of the National Assembly pursuant to S.19 of the Parliamentary Immunities, Powers and Privileges Act before introducing the Hansard Report of 17th April, 2012 as evidence in this Court, the record would show that such leave was sought on 20th December, 2013, and obtained on 31st December, 2013. Time notwithstanding therefore, as at the date of the hearing, the Hansard Report was before this Court and was liberally referred to by both Parties. In any event, John Mnyika, a member of the National Assembly and who was deeply involved in the proceedings of the National Assembly on the material day, also gave oral evidence in Court and largely confirmed the contents of the said Hansard Report.
38. The wider interests of justice would in the circumstances necessitate that we should accept and admit the Report as properly filed, and overrule the objection as framed above.
Issue No.3: Whether or not, the Reference has no merit and should be dismissed for being res *sub-judice*:
39. The merit of the Reference or lack thereof is a matter to be considered in its totality and after all aspects of it have been determined and so at this stage, we shall only apply our minds to the issue whether it is barred by the doctrine of res *sub-judice*. In the Lawdictionary.org (*Black's Dictionary online*), "*sub-judice*" is defined as the Latin term for "*under a Judge; a matter or case that is before a judge or court for determination*". Res *sub-judice* is the rule that stops multiplicity of litigation and gives a boost to meaningful and serious litigants only. It is the Respondent's contention in this regard that all the prayers in the Reference have also been sought in Petition No.1 of 2012 pending before the High Court in Dodoma and therefore, this Petition is barred by the doctrine of res *sub-judice*.
40. We also note that in invoking S.10 of the Indian Code of Civil Procedure and Sakar on the Law of Civil Procedure, the Respondent argued that the issues in contention are the same in both the case before the High Court in Dodoma and the present Reference; that the Parties are the same and the High Court in Dodoma is competent to grant all the reliefs now being sought and therefore the Reference is consequently

barred by the doctrine of res *sub-judice*.

41. In our view, and upon considering this issue, nothing could be farther from the truth. We say so because, the interpretation and application of the Treaty under Article 27 as read with Article 50 thereof is a mandate conferred on this Court. Yet, and on the other hand, the jurisdiction under Article 52(1) of the Treaty is reserved for institutions in Partner States, including the High Court in Dodoma, and this Court has no jurisdiction in that regard. For avoidance of doubt, that Article provides that questions as to membership of the Assembly shall be determined by institutions of the Partner States that determine questions of elections to their respective National Assemblies. In Tanzania, it is agreed that the said institution is the High Court.
42. Even if therefore, the Parties in both the Petition pending before the High Court and the present Reference may be the same, and the election of 17th April 2012 may be the general subject matter of both cases, the competence of the two Courts would exclude the principle of res *sub-judice*. Similarly, the doctrine of res judicata, even if it had been invoked, cannot apply as none of the two Courts have conclusively determined any aspect of the subject matter of the present dispute.

    For the above reasons, the objection as framed above is overruled.

    Issue No.4: Whether or not, the Parliament of the United Republic of Tanzania violated Article 50 of the Treaty for the Establishment of the East African Community by formulating groups of categories for contestants namely: Group A -Gender, Group B - Tanzania Zanzibar, Group C - Opposition Political Parties and Group D - Tanzania Mainland:
43. Elsewhere above, we alluded to the contested interpretation given to Article 50(1) of the Treaty by the Applicant (and CHADEMA) as well as the Respondent.
44. At the hearing of the Reference, the rationale for the two positions was explained as being the uniqueness of Tanzania based on the Union between Tanzania Mainland and Zanzibar, the number of Members of the National Assembly that various Political Parties have in Parliament and the existence of an Official Opposition Political Party.
45. Further in the course of submissions, Parties grappled with the meanings to be attributed to the terms "*proportional representation*" and "*as much as feasible*" and a clear appreciation of Article 50(1) is therefore important as a starting point to addressing those issues. Article 50(1) of the Treaty provides as follows:

    "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 special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine."
46. In *Anyang' Nyong'o (supra)*, the Court stated as follows regarding the words "election" and "elect":

    "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)'.

    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'…"

47. The point made by the Court above is that as regards the procedure and content of the Rules to be followed in an election for representatives to the EALA, the Court cannot assume that responsibility and in fact concluded that:
"if the Court undertakes the task of giving a 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."
48. What then are the Rules that the National Assembly of Tanzania enacted for the purpose of an election under Article 50(1)? It is not contested that the East African Legislative Assembly Election Rules were enacted in 2007 pursuant to Article 50 of the Treaty and Standing Order No.12 of the Parliamentary Standing Orders. Rule 5(5) therefore provides as follows:
"Any Political Party which is entitled to sponsor candidates may submit to the Returning Officer, the names of three candidates for each vacant seat in the following relevant groups:
(a) Group A: Women
(b) Group B: Zanzibar
(c) Group C: Opposition Parties
(d) Group D: Tanzania Mainland"
49. The above criteria is heavily contested and while the Respondent has submitted that it fits the expectations of Article 50(1), the Applicant has suggested other criterion which is as follows:
Category A - Women
Category B - Zanzibar
Category C - Official Opposition Political Party
Category D - Other Opposition Political Parties
Category E - Tanzania Mainland
50. John Mnyika, however, added in his evidence that the lawful and correct criteria should have been that the Political Parties based on their representation in Parliament, should have divided the nine available slots amongst themselves and thereafter, the Ruling Party should ensure that "as much as is feasible", all the other categories including Zanzibar, Tanzania Mainland, gender and special interest groups would be accommodated in the seven (7) positions reserved for it. This approach, in his view, is the only one way of ensuring that there would be "proportional representation" within the meaning of Article 50 of the Treaty.
51. Turning back therefore, to the two terms, "as much as is feasible" and "proportional

representation" within the meaning of Article 50(1), "feasibility" is defined in the *Cambridge Advanced Learner's Dictionary, Third Edition* as "whether something can be made, done or is achieved, or is reasonable". "Proportional Representation" is then defined in *Black's Law Dictionary, Ninth Edition* as "an electoral system that allocates seats to each political group in proportion to its popular voting strength … the term refers to two related but distinguishable concepts: proportional outcome (having members of a group elected in proportion to their numbers in the electorate) and proportional involvement (more precisely termed as proportional voting and denoting the electoral system also known as single transferable voting)".

52. While Article 50(1) of the Treaty does not expressly use the words "proportional representation", the Applicant, on the basis of Standing Order No.12 of the Standing Orders of the Tanzania Parliament has argued that these words must apply to any election under Article 50(1). Standing Order No.12 in that regard states that:
"Election of members of parliament in other organs which by virtue of the law establishing those organs must have parliamentary representative and election of the members of the East African Legislative Assembly will as much as feasible, reflect the proportional representation of various political parties with representation in parliament, gender and representation of the two sides of the union."
53. The above position must then be read with Rule 5(5) aforesaid which for clarity reads partly as follows:
"Any political party which is entitled to sponsor candidates may submit to the Returning Officer, the names of three candidates for each vacant seat in the following relevant groups".
54. As can be seen from a plain reading of the above provisions, the National Assembly of Tanzania, in its wisdom, decided that "proportional representation of the various political parties with representation in parliament" will be the main criteria in meeting the threshold in Article 50. In addition, women and representation of the two sides of the Union (Zanzibar and Tanzania Mainland) are also created as specific groups to be represented within that larger grouping.
55. We say so because in the proceedings of the National Assembly on 17th April 2012, the Speaker is recorded as giving guidance to Members of the Assembly on the interpretation of the Standing Orders and Election Rules for representation in the EALA and she used the following words:
"Group A is for women candidates from the ruling party and the opposition parties and also other political parties with permanent registration….
Group B is from Zanzibar (men and women) from the ruling party and opposition parties with permanent registration….
Group C is for candidates from opposition parties in the National Assembly (men and women) from both sides of the Union….
Group D is for Tanzania Mainland (men and women) from the ruling party, opposition parties and other political parties with permanent registration…."
56. The election was then conducted along the above lines and in fact the Clerk of the National Assembly also confirmed to the Assembly on the material date that by 10th April 2012, he had received thirty three names from CCM, CUF, NCCR-MAGEUZI, UDP, TLP, CHADEMA AND TADEA, all political parties, for purposes of the

election for representatives to the EALA.

57. Reading the above statements and Rule 5(5) above, in the context of Article 50(1), the latter provides the following categories of specific representation:
    i. Gender
    ii. Various Political Parties represented in the National Assembly;
    iii. Shades of opinion; and
    iv. Other Special Interest Groups.
58. It seems to us that, subject to what we shall say later, Standing Order No.12 and Rule 5(5) above, seem to have catered for the following categories but in a very different manner:
    i) Political parties not necessarily represented in the National Assembly (although as can be seen above, "political parties with permanent registration" was the term used);
    ii) Gender (specifically women); and
    iii) Zanzibar and Tanzania Mainland (probably as special interest groups although nowhere is that term mentioned)
59. Where then is the place of "shades of opinion" in Standing Order No.12 and Rule 5(5), which term is expressly used in Article 50(1)? The expression is elusive but it has been defined in the Longman Dictionary of Contemporary English (online edition) as meaning "slightly different from other ones" e.g. "there is room in the Democratic Party for many shades of opinions." Taking that broad definition, can it be said that Standing Order 12 and Rule 5(5) have taken into account "shades of opinion" in their categorization? To the extent that it was completely left out as a category in the election, then there may be incompleteness in the Standing Order and Rules but in the totality of things, their entire formulation, if read liberally, may well indicate different shades of opinion running through the categories in the Assembly's attempt at applying the feasibility principle.
60. Similarly, the Standing Orders and the Rules do not make any reference to "special interest group". The term has been defined in "*Britannica Online*" as "…a formally organized association that seeks to influence public policy" and in the case of *Among Anita vs AG of Uganda,Reference No.6 Of 2012*, this Court included the youth and persons with disabilities as special interest groups. In the present Reference, Parties made no mention of this obvious lacunae in the law as enacted by the National Assembly of Tanzania and therefore in the ultimate adherence to the language of Article 50(1).
61. In any event, and having raised the above concerns, what seems to be an issue before us is the interpretation to be given to category (i) above; various political parties represented in the National Assembly. Standing Order No.12 and Rule 5(5) have deliberately created only one category of representation i.e. political parties. The Applicant on the other hand, while in support of that approach to the election for the EALA, nonetheless argues for separation thereof, so that the Official Opposition Political Party and Other Opposition Political Parties would have separate slots, both in the election and in the ultimate representation at the EALA. In the circumstances and weighing both positions against the other, which view is correct?
62. In our respectful view, both views are wrong. We say so because Rule 5(5) creates

political parties as the sole basis for an election under Article 50 and all other categories such as gender, special interest groups and shades of opinion are subsumed in that single category, hence the language of Rule 5(5) that:

"Any political party which is entitled to sponsor candidates may submit to the returning officer names of three candidates for each vacant seat in the following categories…"

63. In reading the above provision, one must also bear in mind the words of the Speaker above while giving guidance to Members of the National Assembly before the election. We have no doubt that in enacting that sub-Rule, the National Assembly of Tanzania did not adhere to the expectation of Article 50(1) that each category of representation should as much as feasible be a separate and distinct category from each other. To lump all categories under "any political party which is entitled to sponsor candidates" and then grant that one category the preserve to bring candidates for the other categories, so that ultimately every candidate and eventual representative would be affiliated to a political party, whether or not represented in the National Assembly, as opposed to say shades of opinion, gender and other special interest groups, would be a clear violation of Article 50(1) of the Treaty.
64. In holding as we have done above, both the Applicant and the Respondent also seem to be of the view that political parties must have some guarantee of representation in the EALA hence their categorization along political party lines only, even in the case of Zanzibar, which in all sense must remain in a special category in Tanzania for reasons of its unique position in the Union. In addressing that issue, we can do no better than agree with the finding of this Court in *Abdu Katuntu vs. Attorney General of Uganda, Reference No. 5 of 2012* where we stated thus: "On the issue at hand, it is apparent from the Applicant's pleading and the submissions, that the Applicant's main complaint is that the Rules of Procedure are not in conformity with Article 50 of the Treaty, basically on the grounds that the Rules did not guarantee a slot in EALA for each political Party represented in the Parliament of Uganda;
65. With due respect to the Counsel for the Applicant, we are not persuaded by his argument. It is agreed that there are six political parties in Parliament of Uganda and that each had a chance to nominate candidates to stand for election on the Election Day for members of EALA; Further, that the very nature of any election would necessitate that no candidate is issued of election merely because he is supported by a particular political party."
66. Similarly, in *Among Anita (supra)* the Court stated that "…no such guarantee exists for all political parties represented in Parliament or any other group specified in Article 50(1)."

    In the same case, the Court was emphatic that the same position would apply to all other groups mentioned in Article 50(1) and in doing so, it stated thus:

    "It is also our view that, contrary to the Applicant's assertion, there is no requirement to be deduced from Article 50(1) of the Treaty that the said election rules should provide for specific slots for the interest groups set out in the Article or that they should provide for guarantees of representation, specifically of women, youth and persons with disability or any specified grouping provided for by Article 50(1) where such representation is not "feasible." This Court is not clothed with the jurisdiction to

determine such feasibility which is, in any event, left to the discretion of the National Assemblies of Partner States".

67. We reiterate the above findings in the context of this Reference and the said findings would also squarely address both the argument that CHADEMA as the Official Opposition Political Party and the Applicant, as its sole nominee to the EALA, were entitled to automatic representation in that Assembly. All that is expected of the Rules is that:
"the Election Rules must enable the establishment of an electoral process that ensures equal opportunity to become a candidate, full participation and competition for specified groupings and at the end of the process, their effective representation in the EALA" – See *Katuntu (supra)* at page 27.
68. We completely agree with that holding and to conclude on this aspect of the Reference, it is our finding that by formulating Standing Order No. 12 and Rule 5(5) whose effect was to predicate an election under Article 50(1) of the Treaty on representation by political parties only and thereafter creating categories as elsewhere set out, the National Assembly of the United Republic of Tanzania violated Article 50(1) of the Treaty.
Issue No.5: Whether or not, the election of Members of the East African Legislative Assembly on the basis of groups C and D categories violated the Principle of proportional representation as provided for under Article 50 of the Treaty for the Establishment of the East African Community:
69. For avoidance of doubt, category C is Opposition Political Parties and category D is Tanzania Mainland and while categorization and feasibility is otherwise a matter for the National Assembly of Tanzania, once the only criteria and category set by the Rules is that of representation of political parties, then to that extent only, the categorization to create slots for opposition political parties, generally, and Tanzania Mainland under that larger categorization is certainly a violation of Article 50(1) of the Treaty. The reason for that finding is the same as in issue No.4 (above).
70. The other issue arising from the Reference and submissions is that of TADEA which has no representation in the National Assembly but was allowed the opportunity to field a candidate, one Lifa Chipaka, in the election of 17th April, 2012.
71. The above issue requires no more than a firm finding that under Article 50(1), the words "various political parties represented in the National Assembly", if interpreted literally would mean that a political party with no representation in Parliament cannot field a candidate for election to the EALA. Lifa Chipaka, could of course have presented himself for election under any other grouping specified in Article 50 (1) other than political parties represented in the National Assembly because TADEA had no capacity to field him as such.
72. The answer to issue No.5 is therefore that to the extent only that Rule 5(5) aforesaid creates only one group as a basis for an election under Article 50(1), then the further creation of categories C and D above was an act in violation of the Treaty.
73. Similarly, it was a violation of the Treaty for TADEA, a non – parliamentary political party to field one, Lifa Chipaka, as a candidate in its name for the election of 17th April, 2012.In holding as above, it matters not that TADEA fielded Chipaka under the category of Tanzania Mainland. TADEA had no role at all in the election.

Issue No.6: Whether or not, the failure of CHADEMA to get a single representative in the East African Legislative Assembly was caused by non-compliance with Article 50 of the Treaty for the Establishment of the East African Community:

74. We have already made a finding that no group under Article 50(1), including a political a party, is guaranteed representation in the EALA. We reiterate that finding and with regard to CHADEMA specifically, no such a guarantee exists.
75. In addition, it would defeat the whole purpose of an election to guarantee the outcome thereof yet Article 50(1) of the Treaty obligates the National Assembly to conduct an election after creating Rules of Procedure for that purpose. Whether or not Article 50(1) was therefore violated, no guarantee to the Applicant or CHADEMA existed or exists and so this issue must be answered in the negative.

Issue No.7-Whether or not, Article 50 of the Treaty for the Establishment of the East African Community provides a right for representatives of the official opposition party in Parliament to an automatic chance of representation:

Our findings above are a clear answer to the above issue and we reiterate our findings in that regard.

Issue No.8: Whether or not, the Parties are entitled to the remedies sought:

76. We have addressed all the seven core issues framed for determination and at this stage; we must revisit the specific prayers that the Applicant had sought in the Reference.
77. Prayer No.(i): A declaration that the election for members of the fast African Legislative Assembly conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the Treaty.
78. In our analysis above, we reached the conclusion that our jurisdiction is limited to determining whether the criteria in Standing Order No. 12 as read with Rule 5(5) of the Election Rules was consistent with Article 50 of the Treaty. The question whether the present members of the EALA representing Tanzania were otherwise properly elected or not is a matter to be determined by the National Courts of Tanzania.
79. Our conclusion on the above issue therefore is that to the extent only that the rules for election of Tanzania's representatives to the EALA are framed in such a way as to make political parties the sole grouping under Article 50 to form the basis for an election, then there was violation of the Treaty by the National Assembly of Tanzania. The prayer is consequently granted in those terms only.
80. Prayer (ii): A declaration that in obtaining the representatives from group C and D, Article 50 of the Treaty envisages *inter alia*, the observance and compliance of the principle of proportional representation.
81. Our finding on this prayer is that the application of the principle of proportional representation in Standing Order No.12 and thereafter its execution in rule 5(5) does not flow from the language, tenor and spirit of Article 50(1) of the Treaty. In *Katuntu (supra)*, this Court emphatically stated as follows:

"…. We conclude by saying that the meaning and import of Article 50(1) of the Treaty does not require that all six political parties represented in Parliament of Uganda should be represented in the EALA"

82. In reaching the above conclusion, the Court dismissed the submission by Counsel for the Applicant, similar to submissions in this Reference that "….the Treaty envisages some concept of proportional representation, in contradiction to 'winner takes all!"

The above prayer cannot be granted for the above reasons.

83. Prayer (iii) An order prohibiting the Parliament of Tanzania from further violation of Article 50 of the Treaty by not complying with the principle of proportional representation and allowing candidates from political parties which are not represented in the National Assembly to contest in the said election.
84. We have partly answered the above prayer while addressing prayer no. (ii) and we reiterate our findings on the application of the principle of proportional representation. As regards the issue of non-parliamentary political parties fielding candidates in an election under Article 50(1), we have already stated that the said Article by use of the words "the various political parties represented in the National Assembly" could not have also intended that other political parties (without representatives in the National Assembly) could also field candidates as such. TADEA had no capacity to field a candidate for election and to have been allowed to do so was a violation of Article 50(1) of the Treaty by the National Assembly of Tanzania.
In the event, the above prayer is partly granted.
Prayer No. (iv) – an order that the costs of this Reference be paid by the Respondent.
85. Rule 111(1) provides that costs shall follow the event unless the Court shall for good reasons otherwise order. In that regard, the Applicant has only partly succeeded and so we deem it fit that in the circumstances, he should be awarded a quarter of the costs.

**Conclusion**

86. Since the decision in *Anyang Nyong'o (supra)*, this Court has, after every election for representatives to the EALA, received complaints from one Partner State or the other. The Court has been consistent in upholding the spirit, tenor, language and intent of Article 50(1) of the Treaty and it behoves upon the National Assemblies of Partner States to do the same. In saying so, we are alive to the unique political and social circumstances of each Partner State including Tanzania but that uniqueness is no excuse for not strictly following the dictates of the Treaty which they, individually, freely entered into. In the instant case our findings are clear as regards the United Republic of Tanzania. We digress.

**Disposition**

87. For all the above reasons, the final orders in this Reference are that:

a) Prayer (ii) of the Reference is dismissed;
b) Prayer (i) is granted in the following terms only:
"A declaration is hereby issued that to the extent that the election for members of the East African Legislative Assembly conducted by the National Assembly of Tanzania on 17th April, 2012 was premised on only political parties as the sole grouping as opposed to all the other groups envisaged in Article 50(1) of the Treaty, then the National Assembly of Tanzania violated the said Article."
c) Prayer (iii) is granted in the following terms only:
"A declaration that by allowing a political party without representation in the National Assembly (TADEA) to field a candidate in the election of 17th April, 2012 for representatives to the EALA, then the National Assembly of Tanzania was in

violation of Article 50(1) of the Treaty."

d) The Applicant shall have a quarter costs of the Reference.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 8 of 2012

Arising out of Reference Number 1 of 2010 And Taxation Reference No. 1 of 2011

**Hon. Sitenda Sebalu And the Secretary General of the East African Community**

Jean Bosco Butasi PJ; M.S. Arach-Amoko DPJ; J.J. Mkwawa J; I. Lenaola J; F. Ntezilyayo J
November 22, 2013

*Contempt of court - Delayed payment of taxed costs - Council of Ministers and Sectoral Committee on Legal and Judicial Affairs to implement the Judgment of the Court- Whether the Council of Ministers and the Sectoral Committee on Legal and Judicial Affairs infringed the principles of good governance by changing the Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ- Whether respondent's failure to pay the taxed costs was an act of contempt.*

*Articles: 6, 7(2),8(1)(c),13,14,15,16,20,21,22,23, 24, 27(1),30,38, 44 and 71 of the Treaty - Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice.*

The Applicant filed Reference No. 1 of 2010 against the Respondent, the Attorney General of Uganda and others contending that although Article 27(2) of the Treaty provides for conferment on the EACJ, '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 had been conferred on the EACJ by the Council. He averred that the Respondent had, since 4th May 2005, failed to convene the Council of Ministers to conclude a protocol to operationalise the extended jurisdiction of the EACJ in order to handle *inter alia* appeals from the final appellate courts of the Partner States.

On 30th June, 2011, the Court ruled in the Applicant's favour and awarded the Applicant the costs of the said Reference. The bill of costs was taxed in Taxation Cause No. 1 of 2011. However, the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs did not implement the judgment. The Applicant sought orders that failure to implement was a violation of the Treaty.

The Respondent averred that being aggrieved by the said judgment, he filed EACJ Application No. 9. of 2012 under Rules 4, 84 and 85 of the EACJ Rules of Procedure, for leave to appeal out of time. The intended appeal was dismissed on the 14th February 2013

**Held:**

1) The Zero Draft was still work in progress, and Council reserved the right to make any alterations it deemed appropriate during the negotiation process. The Council cannot

for that reason be faulted for violation of any provision of the Treaty in the process of carrying out its functions under the Treaty. until the Protocol was concluded under, its contents could not be known. Therefore, whether the Protocol would be in conflict with the said Article 27(2) was speculative and a decision by the Court in that regard would be premature.

2) The failure by the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs to implement the Judgment of the Court in Reference No 1 of 2010 and Taxation Cause No. 1 of 2011 was an infringement of Article 38(3) of the Treaty and a contempt of Court.
3) The Summit is the highest organ in the institutional framework of the Community as established under Article 9 of the Treaty. Under Article 11(1), it is charged with giving general directions and impetus as to the development and achievement of the objectives of the Community. The binding nature of the Summit decisions, directives and Resolutions on the Council was not debatable.
4) The Respondent was cited for contempt of Court on behalf of the Partner States however, because the Respondent had not flagrantly disrespected the order and had made an effort to convince the Council to pay the taxed costs to the Applicant, and considering the unique circumstances of this case, the Respondent was given three months to purge the contempt and pay the taxed costs.
5) The Respondent was ordered to pay the costs of the Reference to the Applicant.

**Judgment**

**Introduction**

1. This Reference was lodged in this Court on the 28th June, 2012 under Article 30 of the Treaty for the Establishment of the East African Community and Rules 1(2), 21, 74, 84 and 85 of the East African Community Rules of Procedure (hereinafter referred to as the "Treaty" and the "Rules", respectively). It is premised on Articles 6, 7(2), 8(1) (c),13,14,15,16,20,21,22,23,24, 27(1) 29, 38,44 and 71 of the Treaty.
2. The Applicant, Hon. Sebalu, is a resident of Kasangati, Kyadondo East Constituency, Wakiso District, in Uganda. His address for the purpose of this Reference is indicated as c/o M/S Bakiiza & Co. Advocates, Plot 65, 3 William Street Road, Kampala, Uganda.
3. The Respondent is the Secretary General of the East African Community (hereinafter referred to as the "Community" or the "EAC"). He is sued in the capacity of the Principal Executive Officer of the Community pursuant to his mandate under Articles 4(3), 29 and 71 of the Treaty.

**Background**

4. The protracted history of the Reference is as follows: In 2006, the Applicant participated in the Parliamentary elections for the seat of Member of Parliament for Kyadondo East Constituency in Wakiso District, in Uganda. He lost to one Hon. Sam Njuba. He was dissatisfied with the outcome of the election and consequently, he challenged the results in the High Court, the Court of Appeal and eventually he ended up in the Supreme Court, which is the highest Court in Uganda, but he was

unsuccessful in all those Courts.

5. Having exhausted the local courts, he wanted to appeal to the East African Court of Justice (EACJ), but realized that the EACJ lacked the jurisdiction to entertain appeals from the national courts of the EAC Partner States. He then filed *Reference No. 1 of 2010—Sitenda Sebalu v The Secretary General of the East African Community, The Attorney General of the Republic of Uganda*, Hon. Sam Njuba and the Electoral Commission of Uganda. In that Reference, the Applicant's main complaint was that, although Article 27(2) of the Treaty provides for conferment on the EACJ, 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 had been conferred on the EACJ by the Council yet.
6. The Applicant's specific grievance against the Secretary General was that , being the Chief Executive Officer(CEO) of the Community, he is mandated by the Treaty, to convene the Council of Ministers so that they may conclude a protocol to operationalise the extended jurisdiction of the EACJ in order to handle *inter alia* appeals from the final appellate courts of the Partner States and that the said protocol had been pending action since 4th May, 2005 as a Draft Protocol to operationalise The Extended Jurisdiction of the EACJ. Despite that mandate, he had failed to do so.
7. For that reason, the Applicant invited the Court in that Reference, to *inter alia*, interpret Articles 5, 6(d),7(2) and 8(1)(c) of the Treaty so as to determine whether the delay to vest the EACJ with appellate jurisdiction was 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 and which the Partner States undertook to abide by.
8. He contended further 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."
9. Among the Applicant's prayers was that quick action should be taken by the Community in order to conclude a protocol to operationalise the extended appellate jurisdiction of the EACJ under Article 27 of the Treaty to enable the Applicant and other interested litigants preserve their right of appeal to the EACJ.
10. On 30th June, 2011, the Court struck out the case against two of the Respondents but ruled in the Applicant's favour against the Secretary General and the Attorney General of Uganda. The Court made several orders but the order that gave rise to the instant Reference was 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."
11. The Court also awarded the Applicant the costs of the said Reference against the Secretary General and the Attorney General of the Republic of Uganda.
12. Subsequently, the Applicant filed a bill of costs vide Taxation Cause *No. 1 of 2011- Hon. Sitenda Sebalu v- The Secretary General of the East African Community and*

*the Republic of Uganda*. On the 20th January, 2012 the Registrar taxed the bill and awarded a total of USD 105,068.20, as costs to the Applicant to be shared equally between the two Respondents in the sum of USD 52,534.10 each.

13. However, the Council of Ministers did not implement the judgment in Reference No. 1 of 2010 and the Respondent did not pay his share of the taxed costs to the Applicant. Uganda has done so and this Reference was then instituted for the reasons detailed below.

**The Applicant's Case**

14. From what can be deduced from the convoluted pleadings, the grounds of the Reference are that the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs has failed to implement the said judgment and the taxation Ruling . He states that instead of complying with the Court order, the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs, in its meetings held from the 2nd to 3rd November, 2011 and subsequently from the 12th to 13th March, 2012, revised the Draft Protocol to operationalise the extended jurisdiction of the EACJ that was adopted from the Zero Draft Protocol in the meetings held on the 24th November 2004 and on the 8th July, 2005; and later considered in subsequent meetings (hereinafter referred to for brevity as the "Draft Protocol"); and excluded the appellate and human rights jurisdiction therefrom. He contends that this act was in defiance of and a contempt of the judgment and the order of this Court in Reference No.1 of 2010.
15. The Applicant further contends that the failure by the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement the judgment of the Court in Reference No. 1 of 2010 and to pay the costs awarded in Taxation Cause No. 1 of 2011, is an infringement of Articles 7(2),(8)(1)(c), 13,14,15,16,20,21,22,23,27(1),30,38 and 44 of the Treaty.
16. He also avers that the above action by the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs is in itself an infringement of the Fundamental Principles and 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 accepted standards of human rights which are enshrined in the aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.
17. The Applicant also asserts that, being the Principal Executive Officer of the Community, the Respondent is mandated to ensure that meetings of the Council of Ministers / Sectoral Council on Legal and Judicial Affairs and the Partner States to conclude the protocol for the extended jurisdiction of the EACJ are held and the judgment of the Court implemented. He has failed to do so, yet the rule of law requires that public affairs should be conducted in accordance with the law and decisions of the courts. Hence, the Respondent has also disobeyed the orders of the Court.
18. For the reasons above, the Applicant prays for the following declarations and orders from the Court:
    a) The failure of the Council of Ministers/Sectoral Committee on Legal and Judicial Affairs to implement the judgment of the Court in Reference No. 1 of 2010 and

Taxation Cause No. 1 of 2011, is an infringement of Articles 7 (2), 8(1) (c ), 13, 14, 15, 16, 20, 22, 23, 27(1), 30, 38 and 44 of the Treaty.

b) The action by the said Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs of changing the Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ from the one that had been earlier on adopted from the Zero Draft Protocol at its meetings of 24th November 2004 and later on 8th July 2005, is in itself an infringement and a contravention of the fundamental principles and doctrine 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 the aforementioned Articles of the Treaty in particular regard to the peaceful settlement of disputes.

c) The Secretary General should, for and on behalf of the Partner States, be cited for contempt of Court for the abovementioned actions.

d) The Secretary General should be ordered to take action to expeditiously implement the judgment in Reference No. 1 of 2010 and to pay the US$ 52,534.10 adjudged taxed costs.

e) Costs of the Reference be provided for.

**The Respondent's Case**

19. In a brief response filed on the 14th November, 2012 and in the accompanying affidavit sworn on behalf of the Respondent by the then Deputy Secretary General in charge of Political Federation, Dr. Julius Tangus Rotich, the Respondent admits that the Court delivered judgment against him in Reference No. 1 of 2010 and in the ensuing Taxation Cause No.1 of 2011, costs were taxed and he was to pay US$ 52,534.10, but states that:
    a) being aggrieved and dissatisfied with the said judgment, he filed EACJ *Application No. 9. of 2012—The Secretary General of The East African Community vs- Hon. Sitenda Sebalu* under Rules 4, 84 and 85 of the EACJ Rules of Procedure, for leave to appeal out of time; and
    b) that the said application was yet to be heard and determined by the Court.
20. The Respondent avers that, pending the determination of the appeal process he had commenced, he cannot be condemned for:
    a) Contempt of court or infringement of Articles 38 and 44 or any of the stated Articles of the Treaty; or
    b) for having abused his role by conducting public affairs outside the law as alleged by the Applicant in paragraphs 1, 4 and 6 of the Reference.
21. Lastly, the Respondent avers that the pleadings contained in paragraphs 2,3,5 and 7 of the Reference are irrelevant to the matter before the Court and to that extent, render the Reference frivolous and vexatious and an abuse of the Court process.
22. Wherefore, the Respondent contends that the need for granting of the orders sought in the Reference does not arise and prays that the Reference should be dismissed with costs.
23. It should be noted however that the Court heard the application on 22nd January, 2013 and dismissed it in the ruling delivered on the 14th February 2013 and so no further proceedings on appeal are pending at all.

**Points of Agreement**

24. At the close of the pleadings, the parties held a Scheduling Conference on the 5th of February 3013, pursuant to Rule 53 of the Rules of Procedure and the points of agreement were that:
    (a) There is a judgment delivered by the EACJ in *Reference No.1 of 2010, Sitenda Sebalu v The Secretary General of the East African Community and 3 others*.
    (b) There is a taxation ruling in Taxation Cause No. 1 of 2011 arising out of Reference No.1 of 2010 ordering the Respondent to pay the Applicant US $ 52,534.10.
    (c) There is the Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice that was adopted from the Zero Draft Protocol in the Council of Ministers' Meetings held on the 24th November 2004 and later 8th July 2005 and later considered in subsequent meetings.
    (d) The Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs in its meetings held on the 2nd-3rd November 2011 and subsequently on the 12th-14th March 2012, revised the said Draft Protocol and excluded the Appellate jurisdiction and Human Rights jurisdiction.
    (e) There is a Resolution of the EALA made on April 26th 2012 and a Communiqué of the 10th Extraordinary Summit of the EAC Heads of State dated 28th April 2012 urging the Council of Ministers to expedite the amendments of Article 27 of the Treaty and extend the jurisdiction of the EACJ to include among others Crimes Against Humanity.
    (f) That the Court has jurisdiction to determine the Reference.

**Issues**

25. Distilled from the above pleadings, the parties framed the following issues for determination by the Court:
    1) Whether the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs, in its meetings held on the 2nd to 3rd November, 2011 and subsequently on the 12th to 13th March 2012, by revising the Draft Protocol to Operationalise the Extended Jurisdiction of the EACJ that was adopted from the Zero Draft Protocol in the Council of Ministers meetings held on the 24th November 2004 and later on the 8th July 2005; and later considered in subsequent meetings; and excluding the Appellate Jurisdiction and Human Rights Jurisdiction of the Court that was confirmed in *Reference No. 1 of 2010- Sitenda Sebalu vs The Secretary General of the East African Community and 3 Others* is an act of contempt of court.
    2) Whether the action of the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs of changing the Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice that was adopted from the Zero Draft Protocol in the Council of Ministers' meetings held on the 24th November 2004 and later on the 8th July 2005; and later considered in subsequent meetings; is in itself an infringement of the Fundamental Principles and 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 accepted standards of human rights which are enshrined in the

aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.

3) Whether the Resolution of the East African Legislative Assembly made on the 26th April 2012 and the Communiqué of the 10th Extraordinary Summit of the Heads of State dated 28th April 2012 urging the Council of Ministers to expedite the amendment of Article 27 of the Treaty to include jurisdiction to cover among others, Crimes Against Humanity is binding on the Council of Ministers.
4) Whether the Respondent in delaying and or failing or neglecting to pay the US$ 52,534.10 taxed costs to the Applicant is an act of contempt of court and is in itself an infringement of the Fundamental Principles and 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 accepted standards of human rights which are enshrined in the aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.
5) Whether the parties are entitled to the remedies sought.

**Representation**

26. The Applicant was represented by Mr. Bakiiza Chris and Mr. Justin Semuyaba while Mr.Wilbert Kaahwa, the learned Counsel to the Community represented the Respondent. They highlighted written submissions that they had earlier filed.

**Determination of the Issues by the Court**

Issues No. 1 and 4: Contempt of Court

27. It is common ground that the Reference sets out two separate allegations of contempt under issues 1 and 4, respectively. Under issue No. 1, the alleged contempt arises out of the act of the Council of Ministers of revising the Draft Protocol to exclude the appellate and human rights jurisdiction of the EACJ.The issue is basically, whether it is an act of contempt of the order of the Court in Reference No.1 of 2010 that quick action was not taken by the EAC to conclude the Protocol to operationalise the extended jurisdiction of the EACJ under Article 27(2) of the Treaty.
28. The second alleged act of contempt is in respect of delay/failure or neglect to pay the taxed costs to the Applicant. Since they were addressed together by both counsel, we shall also adopt the same order.

**Applicant's submissions**

29. The thrust of the Applicant's argument on this issue is that in Ref. No. 1 of 2010, the Court, under Order number 3 commanded specifically, that quick action should be taken by the EAC in order to conclude the Protocol to operationalise the extended jurisdiction of the EACJ under Article 27 of the Treaty. That the Court should take judicial notice of the fact that the judgment was delivered on 30th June, 2011 and the instant Reference was filed on the 28th of June, 2012.It is that quick action that finally became the source of this Reference because it was close to one year, and in loud silence by the Respondent, that judgment had not been implemented by the Respondent. That instead of implementing the judgement based on the Draft Protocol

as per the Court's order, the Council of Ministers have instead revised the said Draft Protocol to exclude the appellate and human rights jurisdiction to the EACJ. That the Court should therefore find that the act of revising the Draft Protocol that had been confirmed by the Court in its judgment in Ref. No. 1 of 2010 is an act of contempt of the Court.

30. Regarding the second alleged act of contempt, Counsel for the Applicant submitted that the Ruling was delivered on the 20th January, 2012, but up to the date of filing the Reference, the taxed costs had not been paid by the Respondent. Counsel argued that there was moreover an attempt to deny the Applicant the opportunity to enjoy the fruits of his judgment by filing a belated application for extension of time within which to appeal that was fortunately dismissed by this Court. To drive his point home, Counsel also referred to the letter by the Respondent dated 3rd April, 2013 on the subject stating that the Council had even observed that the settlement of the said costs would set a bad precedent and submitted that there is enough evidence to condemn the Respondent for contempt of the Court in respect of the taxation order as well.

**Respondent's submissions**

31. In his reply, Mr. Wilbert Kaahwa, referred to several texts and authorities on the meaning of and the law on "contempt" including *Halsbury's Laws of England, 4th Edition* page 284 paragraph 458; *Eady and Smith, Sweet and Maxwell , 2005 pages 919-926; Kasturial Laroya vs Mityana Staple Cotton Co. Ltd and Another [1958]EA 394, Patel vs Republic, 1969 EA 545;Mutikika vs Baharini Farm Ltd,[ 1985] KLR 227*. He thereafter invited the Court, in determining the issue, to examine and take into account:
    (a) The nature of contempt of court as perceived and propounded in the law ;
    (b) The mandate of the Council of Ministers under the Treaty as well as the Respondent's conduct in handling the matter.
32. He argued very strongly, that the Court would, after carrying out the above examination and applying the law and the relevant provisions of the Treaty to the facts of the case, find that the Reference is not only frivolous and vexatious but the alleged contempt was not backed by law or any evidence at all and it should be dismissed with costs to the Respondent.

**Decision of the Court on issues 1 and 4.**

33. The first issue for determination is whether the failure by the Council of Ministers to implement the order by the Court in Reference No. I of 2010 amounted to contempt of Court.

**The law**

34. It should be noted from the outset that, unlike the case of the national courts of Kenya, Uganda and Tanzania for instance, where there are specific provisions under their laws covering instances of contempt, there is no specific provision under the Treaty or in the Rules of this Court that empowers the Court to deal with cases of contempt. However, we are of the considered view that the Court has inherent power

to deal with such cases under Rule 1(2) of its Rules of Procedure, which provides that: "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

35. According to *Halsbury's Laws of England,(supra)*:
"it is a civil contempt to refuse or neglect to do an act required by a judgment or order of the court within the time specified in that judgment, or to disobey a judgment or order requiring a person to abstain from doing a specific act." .
36. Further, according to case law, it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until it is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.(See: *Hadkinson v Hadkinson [1952] All ER 567*).
37. In *LC Chuck and Cremier [1896] ER 885*, it was held that a party who knows of an order whether null or void, regular or irregular cannot be permitted to disobey it. That it would be dangerous to hold that the suitors or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That the course of a party knowing of an order which is null or irregular and who might be affected by it is plain. He should apply to the Court that it might be discharged. As long as it exists, it must be obeyed.
38. It follows from the above authorities that the position of the law is clear; as long as court orders are not discharged, they are valid and since they are valid, they should be obeyed. That being the case, the only way in which a litigant can obtain reprieve from obeying a court order before its discharge is by applying for and obtaining a stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the risk and pain of committing contempt of court.
39. To prove contempt, the complainant must prove the four elements of contempt, namely:
1) The existence of a lawful order;
2) The potential contemnor's knowledge of the order;
3) The potential contemnor's ability to comply; and
4) The potential contemnor's failure to comply.
(see: Wikipedia, the free encyclopedia).
40. The standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, and almost, but not exactly, beyond reasonable doubt. The jurisdiction to commit for contempt should be carefully exercised with the greatest reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.
(see: *Mutitika v Baharani Farm Ltd (supra)* ).
41. The judgment in Reference No. 1 of 2010 was delivered on the 30th June, 2010. The Respondent admits that he was fully aware of it since he was a party to the proceedings. This Reference was filed on the 28th of June, 2012. That was nearly one year after the date of judgment and the order was to the effect that "3… 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."

42. It is not disputed that to date, the judgment has not been implemented by the Council of Ministers. It is also an agreed fact that the judgment was confirming the Draft Protocol that had been adopted from the Zero Draft Protocol by the Council of Ministers in their meetings held on 24th November, 2004 and later on the 8th July, 2005 and considered in subsequent meetings as well.
43. The Court notes further that both parties agreed that the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs in its meetings held from 2nd to 3rd November, 2011 and subsequently from the 12th to the 14th of March, 2012, revised the said draft and excluded the appellate and human rights jurisdiction therefrom.
44. Apart from that, evidence was adduced by the Applicant and it is also in the public domain that the East African Legislative Assembly (EALA) passed a Resolution on the 26th April, 2012 that was welcomed by the Council of Ministers as well as the Summit of the Heads of States, at its 10th Extraordinary Summit , in the Communiqué dated 28th April, 2012, urging the Council of Ministers to expedite the amendment of Article 27 of the Treaty to extend the jurisdiction of the EACJ to include among others, Crimes against humanity.
45. Evidence has also been availed to this Court, and it is not denied by the Respondent that the latest version of the Draft Protocol on the extended jurisdiction of the EACJ that the Council of Ministers came up with actually excludes the appellate jurisdiction that was the subject of *Reference No 1 of 2010*.
46. With respect to the taxed costs, there is also no dispute that the Registrar granted the order on the 20th January, 2012 and that it is still outstanding.
47. However, the record shows that there was indeed, an attempt by the Respondent to vide *EACJ Application No.9 of 2012* filed on the 10th July 2012, to seek for extension of time to file an appeal against the judgment in Reference No. 1 of 2010. The record further shows that the Court heard the said Application on 22nd January, 2013 and dismissed it on the 14th February, 2013 with costs to the Applicant for lack of merit. The record also shows that the Applicant filed the instant Reference on the 28th June, 2012. Therefore, at the time of filing the instant Reference, Application No. 9 of 2012 was pending determination by the Court.
48. The question then arises as to whether it is sufficient answer to an allegation of contempt if there is a pending appeal process in respect of the judgment from which the alleged contempt arises. Our view is that it does not, in the absence of a stay of execution; a court order must be obeyed. (See: *Hadkinson v Hadkinson supra*). In the premises, the Respondent cannot rely on that Application as a sufficient justification for delaying the implementation of the Judgment as he sought to do in his response to the Reference
49. As earlier stated, in the instant case, there is no order of stay of execution to prevent the Applicant from enforcing the orders nor have the orders been discharged. This means that the judgment of the Court in Reference No. 1 of 2010 remain undischarged and it must be obeyed. The same thing applies to the taxation order in Reference No.1 of 2011, arising therefrom. In the absence of any plausible explanation, the Court holds that disobedience of those orders, which are still in force, constitutes contempt of court.

50. From the above, we find that the Reference is not frivolous and vexatious as Counsel for the Respondent alleged, because the Applicant has proved to the required standard the existence of two lawful orders of the court, the knowledge by the Respondent and the Council and their failure to comply with the said orders.
51. Moreover, under Article 38 (1) of the Treaty:
"(3) A Partner State or the Council shall take, without delay, the measures required to implement a judgment of the Court."
52. The language of the Article is plain and unambiguous. The object and purpose of Article 38(3) of the Treaty is clear. It is to ensure that the orders of the Court are not issued in vain.
53. Although the Applicant in the Reference and the submissions did not seek any specific penalty for the alleged contempt, we shall at the end of this judgment make an appropriate order to that effect.
Accordingly, we answer issues No. 1 and 4 in the affirmative.
Issue No. 2: Whether the act of changing the Draft Protocol is an infringement of the Articles of the Treaty cited therein.

**Applicant's submissions**

54. Counsel for the Applicant submitted that the act of changing the Draft Protocol that had earlier been adopted from the Zero Draft Protocol was an infringement of the Fundamental Principles and 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 accepted standards of human rights which are enshrined in the aforementioned Articles of the Treaty in particular with regard to the peaceful settlement of disputes.
55. His main argument is that the rule of law requires that public affairs are conducted in accordance with the law and decisions of court. According to Counsel for the Applicant, the bone of contention is that the Draft Protocol that was laid before Court in the *Sitenda Sebalu case* is different from the ones the Council of Ministers developed in their meetings of 2nd to 3rd November, 2011 and subsequently 12th to 14th March, 2012, as they went ahead, under the guidance of the Respondent, to craft amendments to the original Protocol and excluded the appellate and human rights jurisdiction of the EACJ. Counsel argued that this is contrary to the undertaking by the Partner States under Article 27(2) that:
"2. 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".
56. According to Counsel, the Court was alive to this fact in the *Sitenda Sebalu case* where it noted that the extended jurisdiction did not come as an afterthought and it held *inter alia*, that, the delay in extending the jurisdiction of the EACJ not only holds back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and implementation of the Treaty and amounts to an infringement of Article 8 (1) (c) and contravenes the principles of good governance as stipulated by Article 6 of the Treaty. That this is the very reason the Applicant has come back to the Court to ensure implementation of that decision.

57. Counsel asserted that judgments of the Court ought to be accepted by the Partner States and the Council of Ministers immediately. This is the clear intention of Article 38 of the Treaty and failure to accept the judgment of the Court is a violation of Article 38 of the Treaty.

**Respondent's submissions**

58. Learned Counsel for the Respondent contended that the act of changing the Draft Protocol was not an infringement of the fundamental principles and doctrines laid down in the Treaty at all. According to Counsel, it is important to put both the law and the Council of Ministers' implementation of that law in proper perspective. The relevant provision is Article 27(2). His contention is that it is important first of all, to note that the Treaty accords the Council of Ministers as the Community policy organ, latitude "to determine" the suitable jurisdiction.

60. He invited the Court to interpret, in terms of Article 31 of the Vienna Convention on the Law of Treaties, 1969, Article 27(2) in good faith and in accordance with the ordinary meaning to be given to the terms of the Treaty in their context. He then went on to argue that if the Contracting Parties to the Treaty intended to donate unrestricted, though desired jurisdiction instantly, they would have provided so clearly and without any ambiguity. That contrary to the Applicant's often repeated assertions, it is not legally tenable to allege, as he does, that the Council of Ministers/ Sectoral Council on Legal and Judicial Affairs are acting contrary to their obligations as far as:
    (a) the implementation of Article 27(2) of the Treaty is concerned; or
    (b) in developing the relevant protocol from a zero stage onto other suitable stages.

61. Counsel drew the Court's attention to the fact that the Court in Reference No.1 of 2010, took cognizance of the role and the activities undertaken by the Council of Ministers in implementing Article 27(2). He pointed out that the Court did not fault the Council of Ministers for developing the protocol in a manner inconsistent with the Treaty as alleged by the Applicant. The Court only faulted the delay in finalizing the protocol.

62. Counsel contended further, that the Applicant cannot be heard to merely plead that the systematic development of the protocol by the relevant organs of the Community is in itself an "infringement of the fundamental principles and 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 accepted standards of human rights". That this allegation must be proven based on evidence and legal tenets.

63. Lastly, Counsel submitted that there is a dearth of relevant authorities in the administrative and adjudicatory handling of allegations of the type the Applicant has pleaded. However, for purposes of persuasive authority, he drew the Court's attention to the assertion in Shelton D: *Remedies in International Human Rights Law, Oxford University press, 1999*, pages 38-90, 183-195; to the effect that in pressing claims of abuse of fundamental rights, pleas must be specific and certain, for purposes of facilitating proceedings. That therefore to the extent that the Applicant's pleadings and submissions on this issue are wide, generalized and mainly arise out of mere conjecture, the allegation is not proven.

**Decision of the Court on issue No. 2**

64. We have perused the pleadings drawn and filed by learned Counsel for the Applicant and we find that they are indeed longwinded and general. The Applicant cites about eighteen Articles of the Treaty as the basis of his Reference. However, the Applicant does not demonstrate how each one of them was infringed in the pleadings. It is only in the submissions that Counsel for the Applicant makes an effort to show that the alleged acts may have infringed Articles 6(d), 7(2), 8(1) (c) ,38 and 44 of the Treaty. The submissions of Counsel for the Respondent has merit to that extent.
65. We are further in agreement with Mr. Kaahwa as far as the interpretation of Article 27(2) *vis -a- avis* the functions of the Council of Ministers under Article 14 of the Treaty. The operative words in Article 27(2) is: "(2)... jurisdiction as will be determined by the Council at a suitable date."
66. It is clear from the language of Article 27(2) that the Contracting Parties did not confer an unrestricted jurisdiction on the Court. They left the role of determining the jurisdiction of the Court to the Council of Ministers as the policy organ of the Community under Article 14 of the Treaty. Indeed it is not for the Court to dictate to the Council of Ministers how to carry out its functions under the doctrine of separation of powers. That is why, for instance, the Court in Reference No.1 of 2010, did not criticize the Council for changing the Zero Draft, but only faulted the Council for delaying the conclusion of the protocol for the extended jurisdiction of the Court. Under Article 23, the role of the Court as the judicial body of the Community, is to ensure adherence to law in the interpretation and application and compliance with the Treaty.
67. Further, it is the view of this Court that the Zero Draft was still work in progress, and therefore, the Council reserved the right to make any alterations it deemed appropriate during the negotiation process. The Council cannot for that reason be faulted for violation of any provision of the Treaty in the process of carrying out its functions under the Treaty.
68. In any event, until the Protocol is concluded under Article 151 of the Treaty, its contents cannot be known. Therefore, whether the Protocol will be in conflict or not with the said Article 27(2) is speculative and a decision by the Court in that regard will be premature. A zero Protocol and a Draft Protocol cannot in the circumstances be placed before this Court for interpretation, as the Applicant's Counsel would like this Court to do.

    For the above reasons we answer issue No. 2 in the negative.

    Issue No.3: Whether the Resolutions of EALA and the Summit Decisions are binding on the Council of Ministers.
69. This issue, with due respect to the parties, was smuggled into the Reference. It was not part of the grounds of the Reference. Nevertheless we shall deal with it since both parties have addressed us on it. It has to do with the Resolution of the EALA made on the 26th April, 2012 and the Communiqué dated 28th April, 2012, issued by the Heads of States at their 10th Extraordinary Summit urging the Council of Ministers to expedite the amendment of Article 27 of the Treaty and extend the jurisdiction of the Court to cover Crimes Against Humanity.

**Submissions by Applicant**

70. Counsel for the Applicant submitted that both the EALA Resolution and the Communiqué are binding on the Council of Ministers. He relied on the case of *Calist Andrew Mwatela and 2 others v EAC; EACJ Application No. 1 of 2005* to support his position.

**Submissions by Respondent**

71. Counsel for the Respondent had the same view. The thrust of his submission is that, on the basis of the provisions of the Treaty ( in respect of the responsibilities of the Summit and its modus operandi) and comparative assessment and practice in the European Union and the African Regional Economic Communities, was that the EAC Summit can direct the Council and the decisions of the Summit are binding on the Council. Accordingly, the decision made by the Summit at the 10th Extraordinary Summit regarding the Resolution of the EALA on the extension of the EACJ is binding on the Council of Ministers. He relied on the case of *Kahoho v The Secretary General of the East African Community: EACJ Ref. No. 1 of 2012* to buttress his argument on the point.

**Decision of the Court**

72. As stated earlier, this was a non- issue. The Summit is the highest organ in the institutional framework of the Community as established under Article 9 of the Treaty. Under Article 11(1), it is charged with the overall supervisory function of giving:
"general directions and impetus as to the development and achievement of the objectives of the Community."
73. As Mr Kaahwa rightly pointed out, the Summit is therefore charged with giving general directions and impetus on such key milestones in the systematic establishment of the integral parts of the Community and ultimately, the political federation. The Court also notes that supremacy in institutional arrangements are a common feature of international organization law. It is a practice that makes the European Commission, for instance, the principal executive arm of the European Union (EU) responsible for:
    (a) generating new laws and policies, overseeing their implementation, managing the EU Budget, representing the EU in the international negotiations and promoting the interests of the EU as a whole; and
    (b) guiding the EU Council of Ministers in making decisions on EU law and policy; and
    (c) proposing draft laws to the EU Council and Parliament.
74. The Court further notes for comparative purposes that the Summit of the Heads of States in the other Regional Economic Communities such as the Common Market for Eastern and Southern Africa (COMESA), the South African Development Community (SADC), play a similar role.
75. The binding nature of the Summit decisions, directives and Resolutions on the Council is thus not debatable. We accordingly answer this issue in the affirmative as well.
Issue No. 5: Whether the Applicant is entitled to the Remedies sought.

**Applicant's Submissions**

76. Counsel for the Applicant contends that the Applicant is entitled to the remedies sought.

**Respondent's submissions**

77. On the Contrary, Counsel for the Respondent submits that the Applicant's entitlement to the remedies sought depends on proof of his allegations. He submits that the requisite standard of proof has not been attained by the Applicant as far as the pleadings and submissions are concerned.
78. Counsel further submits that, without derogation from the above submissions, the Court ought to appreciate that the EAC is an international organization, established by an international Agreement of more than two State Parties, of which he is the Principal Executive Officer. As such, the EAC has immunity from suits and legal process. (See: *Halsburys Laws of England, 4th Edition at page 608 paragraph 915*.)
79. He also submits that Article 73(1) specifically gives immunity to the Respondent as an employee of the EAC from legal process in respect to omissions or acts performed by him in his official capacity. In addition, Article 138 (1) provides that the Community shall enjoy international legal personality, while Article 138 (3) states that each of the Partner States shall accord to the Community and its officers the privilege and immunity accorded to other similar international organizations in its territory.
80. He further asserted that, the EAC Headquarters Agreement grants the EAC Immunity from judicial, executive, legislative and administrative processes. As stated in *Beer Und Regan v Germany, Appl. 28934/94*, European Court of Human Rights, this emanates from recognition by sovereign states of the fact that "the attribution of those privileges and immunities is an essential means of ensuring the proper functioning of such organizations free from the unilateral interference by individual governments."
81. The main privileges and immunities typically enjoyed by international organizations and in the case of the EAC are: immunity from jurisdiction and execution, the inviolability of premises and archives, currency and fiscal privileges and freedom from communication.
82. That in light of this international law position of which the Applicant's Counsel is aware, no execution process can be levied upon the EAC by virtue of the Diplomatic Privileges it enjoys. It is the Respondent's submission that based on the arguments set forth hereinabove, the Applicant is not entitled to the remedies he seeks.

**The Decision of the Court**

83. From the pleadings and the submissions, the Applicant seeks declarations and orders that:
    (a) That the failure of the Council of Ministers/ Committee on Legal and Judicial Affairs to implement the judgment of the Court in Reference No.1 of 2010 and Taxation Cause No.1 of 2011, is an infringement of Articles 7(2),8(1)(c),13,14,15 ,16,20,21,22,23,27(1),30,38 and 44 of the Treaty.
    b) The action by the said Counsel of Ministers/ Sectoral Committee on Legal and Judicial Affairs of changing the Draft Protocol to Operationalise the Extended

Jurisdiction of the EACJ from the one that had been earlier on adopted from the Zero Protocol at its meetings of 24th November 2004 and later on 8th July 2005, is in itself an infringement and a contravention of the fundamental principles and doctrines 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 the aforementioned Articles of the Treaty in particular regard to the peaceful settlement of disputes.

c) The Secretary General should, for and on behalf of the Partner States, be cited for contempt of Court for the above mentioned actions.

d) The Secretary General should be ordered to take action to expeditiously implement the judgment in Reference No. 1 of 2010 and to pay the US$ 52.534.10 adjudged taxed costs.

e) Costs of the Reference be provided for.

84. We have considered the submissions of both learned counsel and taken into consideration the pleadings and evidence on record. In light of our findings and conclusions on the issues herein, we make the following declarations and orders:

(a) The failure by the Council of Ministers/ Sectoral Committee on Legal and Judicial Affairs to implement the Judgment of the Court in Reference No 1 of 2010 and Taxation Cause No. 1 of 2011 is an infringement of Article 38(3) of the Treaty and a contempt of Court.

(b) Prayer (b) is disallowed.

(c) Prayer (c) is granted. However, because the Respondent has not flagrantly disrespected the order since he has made an effort to convince the Council to pay the taxed costs to the Applicant as per his letter referred to earlier on in this judgment, and considering the unique circumstances of this case, therefore, the Court hereby grants the Respondent the opportunity to purge the contempt with respect to the taxed costs and to pay the same within three (3) months from the date of this order.

(d) Prayer (d) is granted but only in respect of the judgment in Reference No.1 of 2010.

(e) Prayer (e) is also granted, since this Reference was a result of the failure by the Partner States to implement the Court's orders. The Respondent shall pay the costs of the Reference to the Applicant.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 9 of 2012

**Venant Masenge And The Attorney General of the Republic of Burundi**

Isaac Lenaola, DPJ, Faustin Ntezilyayo, J, Monica K. Mugenyi, J
June 18, 2014

*Failure to protect property rights - Jurisdiction - Preliminary objection procedure- Whether Burundi's Minister of Home Affair's contravened the Treaty through inaction.*

*Articles 3(3)(b), 6(d), 7(2), 8(4), 27(1) and 30(1) &(2) of the EAC Treaty - Articles 1, 2 and 14 of the African Charter of Human and Peoples' Rights - Rule 41 of the EACJ's Rules of Procedure, 2010.*

The Applicant averred that he was the proprietor of 24 hectares of land in the Commune of Gihanga in Bubanza Province, Burundi and that he had legal title. Following an encroachment onto his land by the Mayor of Gihanga Commune and several other people, on 12th March 2012 the Applicant sought the authority of the Minister of Home Affairs for the peaceful restoration of his land. After three-months had elapsed without a response from the Minister, the Applicant filed this Reference averring *inter alia* that the Minister of Home Affair's inaction violated Article 6(d) of the Treaty.

The Respondent contended that the Court was not competent to hear and determine land matters and that the Applicant had Applicant already instituted a similar case in the Administrative Court in Burundi and the case was pending determination.

**Held:**

1) The interpretation and application of Articles 6(d) and 7(2) of the Treaty, in order to determine whether the occupation and exploitation of the Applicant's land and the denial of his rights, were infringements of the Treaty were matters within the jurisdiction of the Court under Article 27(1) of the Treaty.
2) The Applicant's land title was conclusive evidence of ownership that ought to be protected. That the failure by the appropriate authorities of the Republic of Burundi to ensure the protection of the Applicant's land property rights was fundamentally inconsistent with Burundi's express obligations under Articles 6(d) and 7(2) of the Treaty. Therein, Burundi undertook to observe the principles of good governance including in particular, the principles of adherence to the rule of law, and the promotion and protection of human rights. This failure constituted an infringement of the said provisions of the Treaty.

**Cases cited:**

Ddungu v Marc Widmer & Anor, Civil Appeal No. 38 of 2009, [2012] UGHC121;
Festus Mwanzi Lonzi v Roseline Muthoni Muburu, Environmental & Land Case 606 of

2011, [2012], eKLR
James Katabazi & 21 others v The Secretary General of EAC & The Attorney General of Uganda, EACJ Reference No.1 of 2007
Peter Anyang' Nyong'o & others v The Attorney General of Kenya & others, EACJ Reference No.1 of 2006
Samuel Mukira Muhochi v The Attorney General of Uganda, EACJ Reference No. 5 of 2011
The Attorney General of Rwanda s v. Plaxeda Rugumba, EACJ Appeal No.1 of 2012

**Judgment**

1. This is a Reference by one Venant Masenge a resident of the Republic of Burundi (hereinafter referred to as the "Applicant"). His address for the purpose of this Reference is indicated as C/O Mr. Horace Ncutiyumuheto, Boulevard Patrice Lumumba, P.O. Box 1374 Bujumbura, Burundi.
2. The Reference was filed on 10th August 2012 under Articles 3(3)(b), 6(d), 7(2), 8(4), 27(1) and 30(1) &(2) of the Treaty Establishing the East African Community (hereinafter referred to as the "Treaty") and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as the "Rules").
3. The Respondent is the Attorney General of the Republic of Burundi sued in his capacity as the Principal Legal Adviser of the Republic of Burundi.

**Representation**

4. The Applicant was represented by Mr. Horace Ncutiyumuheto while Mr. Elisha Mwansasu appeared for the Respondent.

**The Applicant's Case**

5. The Applicant's case is contained in the Reference, an affidavit in support and a counter-affidavit sworn on 10 August 2012 and 24 October 2013, respectively, by the Applicant himself, a reply to the amended Respondent's Response to the Reference filed on 26th March 2013, as well as his submissions.
6. The Applicant averred that he is the proprietor of a land property measuring 24 hectares in the Commune of Gihanga in Bubanza Province, Burundi and that he holds a legal and official title to the said property as demonstrated by the Registration Certificate of land property VOL.ECCXXV Portfolio 134 issued by the Registrar of land titles, on 9th October 2009.
7. He alleged that following encroachment onto his land by Mr. Anthere Nzohabonayo, a local troublemaker and Mr. Bonaventure Ntirandekura, the Mayor of Gihanga Commune, together with their supporters, he referred the matter to the Minister of Home Affairs on 12th March 2012 seeking for his authority to take all the necessary actions to restore completely and peacefully his possession of the land. He further stated that he never received any response from the Minister of Home Affairs, which made him presume an implicit refusal, after the three-month legal deadline to respond had elapsed. He then referred the matter to this Court holding the Government of Burundi vicariously responsible for the actions of the Mayor of Gihanga Commune

and the inaction of the Minister of Home Affairs which, in his view, violated the fundamental principles referred to in Article 6(d) of the Treaty.

8. The Applicant therefore pleads for the following prayers and orders, against the Respondent:
   a) A declaration that the occupation and exploitation of the Applicant's land property is unlawful and is an infringement of Article 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
   b) A declaration that the whole land of Kizina as claimed by the Applicant and demarcated on the Registration Certificate belongs to Masenge Venant and all illegal constructions and occupations have to be immediately demolished by the Respondent and turned out[sic];
   c) An order that the Respondent restitutes the full property to the Applicant;
   d) Declare that the Applicant has a full right to enjoy the property right on Kizina land according to his Registration Title;
   e) An order that costs and incidental to this Reference be met by the Respondent;
   f) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances."

**Respondent's case**

9. The Respondent's case is set out in an amended Response to the Reference filed on 22nd February 2013, an Affidavit in support of the Respondent's Response to the Reference sworn on 8th October 2013 by Mr. Claude Nimubona and written submissions filed on 8th January 2014.
10. Briefly, his response is as follows:
    a) The matter is about land property and as such, this Court is incompetent to hear and determine it, since such a matter is reserved for the national courts of the Republic of Burundi in accordance with Article 27 of the Treaty.
    b) He contends that the Applicant has already instituted a similar case in the Administrative Court in Burundi, to wit, RAC 6190 and the case is still pending determination.
    c) The costs and incidental to the Reference should be met by the Applicant.

**Scheduling Conference**

11. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 25th January 2013 at which the following were framed as issues for determination.

**Issues for determination by the Court**

a) Whether the Court has jurisdiction to entertain the Reference;
b) If so, whether the failure by the Minister of Home Affairs to order the demolition and/or stop all construction on the Applicant's land is an infringement of Articles 3(3)(b), 6(d) and 7(2) of the Treaty.
c) Whether the Applicant is entitled to the order sought.

**Determination of the Issues**

Preliminary Objection

12. In his written submissions filed on 8th January 2014, Counsel for the Respondent raised for the first time the question of limitation of time. He contended in that regard that this Reference is time-barred since the Applicant filed it on 10th August 2012, almost a year after the decision of the Minister of Home Affairs, whereas Article 30(2) of the Treaty provides that proceedings shall be instituted within two months of the decision complained of. In support of his contention, the learned Counsel cited *EACJ Appeal No.2 of 2012, Attorney General of the Republic of Uganda & another Vs. Omar Awadh & 6 others*, where the Appellate Division of this Court ruled that for purposes of proceedings filed in this Court, time starts running under Article 30(2) of the Treaty not on the day the act complained of ends, but on the day when it is first effected.
13. During the hearing to highlight parties' written submissions, Counsel for the Applicant strongly opposed the submission of a preliminary objection at that stage of the proceedings and contended that this breached Rule 41 of the Court's Rules which requires that any preliminary objection should be raised by pleading and before the Scheduling Conference under Rule 53 of the Court's Rules. He then argued that by so doing, the Respondent took him by surprise since he did not get time to prepare an appropriate response.

**Court's Findings**

14. It is noteworthy that the question whether or not the Reference is time-barred was neither raised in the Respondent's Response to the Reference, nor was it raised during the Scheduling Conference which set up issues for determination by the Court. In that regard, we consider that it was not proper to raise it as an issue for determination after and not before the Scheduling Conference. It should also have been raised in the pleadings so that the Applicant could have gotten an opportunity to address it in his submissions and later on in the rejoinder.
15. Given the foregoing and taking into consideration the issue at hand, it is our view that such submissions made at the tail end of the proceedings without allowing the other party to prepare an appropriate response was in breach of Rule 41 of the Court's Rules and cannot be entertained. For ease of reference, Rule 41 of the Court's Rules reads as follows:

    "(1) A party may by pleading raise an preliminary objection.

    (2) Where a respondent intends to raise a preliminary objection he shall, before the scheduling conference under Rule 53 of the Rules, give not less than seven (7) days written notice of preliminary objection to the Court and to the other parties of the grounds of that objection."
16. We are aware that in some legal regimes, a preliminary objection on a point of law, including on limitation of time can be raised at any time even when the pleadings have been closed, but the above quoted Rule of the Court does not offer that possibility. It is worded in mandatory terms and should be complied with. Rules are the handmaidens of justice and are not enacted for cosmetic reasons. Whatever the merits of the issue raised by the Respondent, once it is raised unprocedurally,

the Court cannot legitimise an unprocedural matter by determining it on its merits. Therefore, the Respondent's preliminary objection as framed above is rejected.

I ssue No.1: Whether the Court has jurisdiction to entertain the Reference

17. The question as to whether the Court has jurisdiction to entertain this Reference was an issue raised by the Respondent. Counsel for the Respondent argued that according to Article 27 of the Treaty, this Court lacks jurisdiction to hear and determine the dispute which is related to land and as such, falls under the jurisdiction of national courts. He hastened to add that the Applicant is fully aware of that fact since he filed a similar case referenced RAC6190 at the Administrative Court of Bujumbura.
18. Furthermore, learned Counsel contended that this Court does not have jurisdiction to declare that the Applicant has a full right to enjoy land property since only the abovementioned Burundian Court is competent to deal with the matter. On this basis, he prayed that the Court should dismiss the Reference for the reason that it is only competent on matters requiring interpretation and application of the Treaty, not those ordering demolition of properties and constructions as that jurisdiction belongs to national courts of Partner States.
19. In response to the Respondent's arguments on this issue, Counsel for the Applicant submitted that this Court derives its mandate from Articles 23(1), 27(1) and 30(1) of the Treaty.
20. In Article 23(1), it is stated that "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."
21. According to Article 27(1) of the Treaty, "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*."
22. As for Article 30(1) of the Treaty, it 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."
23. The Applicant's allegations in the instant matter are that, despite holding a valid land title, he has seen his land being expropriated by administrative organs of the Government of Burundi which argued at first, that there was a public need for the use of the property and later on that the property has never belonged to him. Counsel for the Applicant further stated that the Applicant complained to different administrative authorities, including the Minister of Home Affairs, but that he has never been restored in his rights.
24. Counsel then asserted that the Applicant's main claim is that the occupation and exploitation of his property is unlawful and is an infringement of Article 6(d) of the Treaty. He submitted in that regard, that this Court has jurisdiction to entertain the case since the act of denying Mr. Venant Masenge his property rights over a land legally possessed constitutes a violation of the principles of good governance and rule of law as provided by Articles 6(d) and 7(2) of the Treaty. In support of this argument,

Counsel referred us to a number of cases viz. *EACJ Ref. No.3 of 2010: Independent Medical Unit Vs The Attorney General of Kenya & 4 others; EACJ Ref. 9 of 2012: The East African Center for Trade Policy and Law Vs The Secretary General of the EAC; EACJ Appeal No.1 of 2012: The Attorney General of Rwanda Vs Plaxeda Rugumba; EACJ Ref. No.1 of 2007:James Katabazi & 21 others Vs The Secretary General of EAC & The Attorney General of Uganda; EACJ Ref. No.1 of 2006: Peter Anyang' Nyong'o & others Vs The Attorney General of Kenya & others; EACJ Ref. No. 5 of 2011: Samuel Mukira Muhochi Vs The Attorney General of Uganda*.

25. On the question of non exhaustion of local remedies raised by the Respondent's Counsel, learned Counsel pointed out that the Applicant, being a natural person who has direct access to the Court under Article 30(1) of the Treaty, is not required to first exhaust local remedies before seeking this Court's intervention.

**Determination of the Issue**

26. We have carefully considered the rival submissions by learned Counsel and we opine as hereunder:
    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. And, as decided in the *Samuel Mukira Muhochi case (supra)*, "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."
    It is our view that, in the instant matter, what the Applicant seeks, among others, is for this Court to determine whether the actions and decisions of the Respondent were an infringement of specific provisions of the Treaty, namely Articles 6(d) and 7(2).
27. According to Article 6(d) of the Treaty, one of the fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States is "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunity, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter of Human and Peoples' Rights."
28. Similarly, Article 7(2) of the Treaty provides that "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."
29. It is our considered opinion that the interpretation and application of these provisions in order to determine whether the impugned actions and decisions (i.e. the occupation and exploitation of the Applicant's land property, and the denial to restore the Applicant in his rights, in spite of the possession of a valid land title) are infringements of the Treaty, are matters within the jurisdiction of this Court under Article 27(1) of the Treaty. (see *Samuel Mukira Muhochi case, supra*).
30. In light of the foregoing and guided by the Court's previous decisions on similar matters [see for examples: *Plaxeda Rugumba case (supra), Peter Anyang' Nyong'o case (supra), James Katabazi case (supra); Samuel Mukira Muhochi case (supra)*], we are of the decided opinion that the Court has jurisdiction to entertain this Reference, but

subject to what we shall say about prayers (b), (c) and (d) of the orders sought by the Applicant.

Therefore, Issue No. 1 is partly answered in the affirmative.

Issue No.2. Whether the failure by the Minister of Home Affairs to order the demolition and/or stop all constructions on the Applicant's land is an infringement of Articles 3(3)(b), 6(d) and 7(2) of the Treaty

31. From the outset, Counsel for the Applicant asserted that when the Republic of Burundi acceded to the EAC Treaty, it accepted to be bound by its provisions, the most relevant for this case being Articles 3(3) (b), 6(d) and 7(2). These provisions require all Partner States to uphold the fundamental and operational principles of the Community such us good governance, rule of law and the observance of human rights and social justice.
32. Learned Counsel pointed out that Article 6(d) of the Treaty obliges the Government of Burundi to ensure good governance which includes, *inter alia*, the recognition and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights which has been ratified by the Republic of Burundi.
33. In support of his case, he cited Articles 1, 2 and 14 of the said Charter.
    Article 1 thereof provides that "The Member States of the Organization of the African Union, parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measure to give effect to them."
34. Regarding Article 2, it states that "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, political or any other opinion, national and social origin, fortune, birth or any status."
    Article 14 reads: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."
35. It was contended by learned Counsel in the above regard that since the right to the disputed property is attested by an official and legal title held by the Applicant, and that the Respondent has not contested that the said property is occupied and exploited forcefully by governmental agencies of the Republic of Burundi, and considering that complaints to different administrative authorities in order to have his rights restored have fallen on deaf ears, the Government has violated Articles 1, 2 and 14 of the African Charter of Human and Peoples' Rights as well as Articles 3(3)((b), 6(d) and 7(2) of the Treaty. He thus submitted that this Court, by virtue of Article 23(1) of the Treaty, has to ensure adherence to these provisions in the interpretation and application of the Treaty.
36. Counsel went on to point out that the Government of Burundi, through its Minister of Home Affairs or otherwise, had the obligation to protect the property rights of the Applicant which constitutes an issue of good governance. He therefore submitted that the arbitrary and illegal occupation of a land property of a citizen by any organ of a Partner State of the Community constitutes a violation and an infringement of the principles of good governance, the rule of law and social justice.

37. Counsel finally referred us to the *Samuel Mukira Muhochi case* where the Court decided that: "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". He submitted therefore that similarly, the denial of Applicant's enjoyment and use of his land, and the lack of protection of his property rights by the Government of Burundi is illegal, unlawful and a breach of Burundi's obligations under Articles 3(3)(b), 6(d) and 7(2) of the Treaty.
38. The Respondent's Counsel made a brief response on this point and he contended essentially that the Applicant did not have any evidence concerning the way he acquired the disputed land. Relying on Rule 63(1) of the Court's Rules which states that: "at the hearing the party having the right to begin shall state its case and produce evidence in support of the issues which it is bound to prove", he challenged the Applicant to produce documents showing the way he acquired the land. It also is his case that although the procedure to be followed in Burundi for the registration of land ownership does not show whether the land was acquired legally or illegally, he maintained nevertheless that the land title issued to the Applicant is illegal.

**Determination of Issue No.2**

39. After carefully considering the submissions made by both sides and perusing the pleadings on record, the following are our findings and conclusions:
    As the case stands, the crux of the Applicant's plea, as can be gleaned from the Reference, is that the Respondent breached Articles 6(d) and 7(2) of the Treaty by not protecting his property rights over a land for which he possesses a legal title duly issued by a competent authority in the Republic of Burundi.
40. In support of his argument, the Applicant's Counsel referred us to Article 317 of the 2011 Burundi Land Act and Articles 1, 2 and 14 of the African Charter for Human and Peoples' Rights.
41. Article 317 of the Burundi Land Act provides that, "The right to land can be established: either by the land title established by the Registrar of land titles or by a land certificate established by the municipal land service recognizing a regular appropriation of land resulting in personal or collective, permanent and sustainable possession, according to the custom of the time, the place and the use of the land."
    Articles 1, 2 and 14 of the African Charter of Human and Peoples' Rights have been cited above.
42. Counsel for the Respondent's main counter-arguments are that the Applicant acquired and occupied the disputed land illegally, that the Burundian laws do not recognize automatically a land title as proof of ownership and that the National Commission for Land and other Properties has issued a report which shows that the Applicant has no rights over the said land. The learned Counsel did not however allude to any law in support of his contentions.
43. We are also aware that Article 36 of the Constitution of the Republic of Burundi provides that: "Every person has the right to property. No one shall be deprived of his possessions except in public interest, in circumstances and manner determined by law and subject to fair and prior compensation or pursuant to a court decision having

the authority of res judicata."

44. In light of the foregoing, we are satisfied that the Applicant's land ownership is, in conformity with Article 317 of the 2011 Burundian Land Act, evidenced by the Registration Certificate of a land property Vol.ECCXXV Portfolio 134 issued on 9th August 2009 by the Registrar of Land Titles. And as such, the Applicant's land ownership should be protected under the above quoted Article 36 of the Constitution of the Republic of Burundi and relevant provisions contained in conventions and treaties to which the Republic of Burundi is signatory. Of importance for this Reference are the abovementioned quoted Article 14 of the African Charter for Human and Peoples' Rights and Articles 6(d) and 7(2) of the Treaty.
45. All the aforementioned legal instruments recognize the right to property and state that any encroachment upon it should follow due process of law in order to avoid any arbitrary exercise of government power.
46. No evidence was adduced by the Respondent that any legal proceedings seeking the nullification of the Applicant's land title has been undertaken either by the Government of Burundi or by the Commission for Land and other Properties.
47. It is our view that a land title is a conclusive evidence of the Applicant's land ownership that ought to be protected as required by the abovementioned provisions. Similar cases have been decided where courts have held that a certificate of title issued by the Registrar of land titles is conclusive evidence of the registered proprietor's ownership thereof (see *Ddungu Vs Marc Widmer & Anor, Civil Appeal No. 38 of 2009, [2012] UGHC121; Festus Mwanzi Lonzi Vs Roseline Muthoni Muburu, Environmental & Land Case 606 of 2011, [2012], eKLR*).
48. For all those reasons given above, we hold that the failure by the appropriate authorities of the Republic of Burundi to ensure the protection of the Applicant's land property rights was fundamentally inconsistent with Burundi's express obligations under Articles 6(d) and 7(2) of the Treaty to observe the principles of good governance including in particular, the principles of adherence to the rule of law, and the promotion and protection of human rights. This failure constitutes an infringement of the said provisions of the Treaty.

    Therefore, Issue No.2 is answered in the affirmative.

    Issue No.3: Whether the Applicant is entitled to the order sought

    Both Counsels made no submissions on this issue.
49. We note, however, that the Applicant seeks the followings declarations and orders:

    "(a) A declaration that the occupation and exploitation of the Applicant's property is unlawful and is an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community.

    (b)A declaration that the whole land of Kizina as claimed by the Applicant and demarcated on the Registration certificate belongs to Venant Masenge and all illegal constructions and occupations have to be immediately demolished by the Respondent and turned out.

    (c) An order that the Respondent restitutes the full property of the land to the Applicant.

    (d) Declare that the Applicant has a full right to enjoy the property right on Kizina land according to his Registration title.

(e) An order that the costs and incidental to this Reference be met by the Respondent.
(f) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances."

50. We have addressed prayer (a) while determining Issue No. 2 of the Reference. As for prayers (b), (c) and (d), we are of the view, in agreement with the Respondent, that this Court is not clothed with the jurisdiction to grant them since they clearly fall outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

**Conclusion**

51. In light of our findings and conclusions on issues herein, we make the following orders:
    1. A declaration that the occupation and exploitation of the Applicant's property is unlawful and is an infringement of Article 6(d) of the Treaty for the Establishment of the East African Community.
    2. Prayers (b), (c) and (d) are disallowed.
    3. On costs, the Applicant has partially succeeded and shall be awarded half of the taxed costs to be borne by the Respondent.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 9 of 2012

**The East African Centre for Trade Policy and Law And The Secretary General of the East African Community**

Johnston Busingye, PJ; Mary Stella. Arach-Amoko, DPJ; John Mkwawa, J; Jean Bosco Butasi, J; Isaac Lenaola, J
May 9, 2013

*Concurrent jurisdiction – Common Market Dispute Settlement Mechanism – No ouster of EACJ jurisdiction- Specialized dispute resolution mechanisms – Whether the dispute resolution mechanisms in EAC Customs Union Protocol and Common Market Protocol were inconsistent with the Treaty and limited EACJ's jurisdiction.*

*Articles: 5, 6, 8 (1),(4) & (5), 23, 27(1), 30(1) & (3), 33 and 126 of the Treaty - Rules 1(2) and 24 of The East African Court of Justice Rules of Procedure , 2010 - Annex IX East African Customs Union Protocol - Article 54(2) of the Common Market Protocol.*

On 3rd March 2004, the Partner States had concluded the Customs Union Protocol which established the East African Community Committee on Trade Remedies with the jurisdiction on dispute settlement in accordance with Annex XI, the East African Customs Union (Dispute Settlement Mechanism) Regulations. Thereafter on 14th December, 2006 and 20th August, 2007, the Treaty was amended and provisos to Article 27(1) and Article 30(3) were introduced.

Subsequently on 20th November 2009, Partner States concluded the Common Market Protocol which also contained a dispute settlement mechanism. Under Article 54 (2), Partner States guaranteed the right of persons seeking redress under the competent judicial, administrative or legislative authorities in line with the Constitutions, national laws and administrative procedures of Partner States.

The Applicant filed this Reference averring that the amendments to the Treaty and the dispute settlement mechanisms provided for in the two Protocols, denied original jurisdiction to the EACJ in handling disputes arising from the Protocols by transferring matters reserved for the EACJ under the Treaty to Partner State institutions and organs. And this was likely to lead to conflicting interpretations of the Treaty and a diluting of the EACJ's special jurisdiction. Furthermore, the presence of the provisos to Articles 27(1) and Article 30(3) were contrary to the expectations and aspirations of the people of East Africa.

**Held:**

1) Although the provisos to Article 27(1) and Article 30(3) of the Treaty did not take away or oust the jurisdiction of the EACJ, they undermined its supremacy and contravened Articles 5, 6, 8 (1), (4) & (5) and 23 of the Treaty.

2) The provision of specialized dispute resolution mechanisms on technical matters under the Customs Union and the Common Market Protocol was not unique to the East African integration process. It is prevalent and common to all countries that have subscribed to multilateral trading arrangements under the World Trade Organization. EAC Partner States that are members, have subscribed to the WTO Dispute Settlement process.
3) The dispute settlement mechanisms provided under the Customs Union and the Common Market Protocol were created for administrative expediency and they did not oust the original jurisdiction of the Court of handling disputes there under.

**Cases cited:**
Christopher Mtikila v. The Attorney General of The United Republic of Tanzania, EACJ Reference No. 1 of 2008
East African Law Society & Others v Attorney General of Kenya & Others, EACJ Reference No. 3 of 2007
Flamino Costa vs ENEL, ECJ, Case 6-64
Hon. Sitenda Sebalu v The Secretary General of the EAC, EACJ Reference No. 1 of 2010
Modern Holdings (EA) Ltd v Kenya Ports Authority, EACJ Reference No. 1 of 2008:
Professor Anyang' Nyongo and Others v The Attorney General of Kenya and Others, EAC Reference No. 1 of 2006
R. v Kent Justices ex parte Lye [1967] 2 QB 153;
Union Transport Plc v Continental Lines SA [1992] 1 WLR 15

**Judgment**

**Introduction**
1. This Reference dated 25th November, 2011, was premised on Articles 5, 6, 8 (1),(4) & (5), 23, 27(1), 30(1) & (3), 33 and 126 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 24 of The East African Court of Justice Rules of Procedure ( hereinafter referred to as the " Treaty" and the "Rules" respectively).
2. The Applicant is the East African Centre For Trade Policy, a registered company limited by guarantee in the Republic of Uganda whose address for purposes of this Reference was indicated as: c/o M.B Gimara Advocates, Plot 4, Jinja Road, 5th Floor, Northern Wing, Social Security House, P.O Box, 28661, Kampala, Uganda.
3. The Respondent is the Secretary General of the East African Community (hereinafter referred to as "the Community"), sued in the capacity of the Principal Executive Officer of the Community, the Head of the Secretariat and the Secretary to the Summit, pursuant to Article 67 of the Treaty.

**Background**
4. The undisputed background to the Reference is as follows: On 30th November 1999, the Heads of State of Kenya, Uganda and Tanzania signed the Treaty for the Establishment of The East African Community. The Treaty entered into force on 7th July 2000. Article 9(e) established the East African Court of Justice (hereinafter referred to as "the EACJ"), as one of the organs of the Community. Article 23 of the

Treaty stipulated the role of the Court as follows:
"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."

5. The jurisdiction of the Court was spelt out in Article 27 of the Treaty in the following words:
"1. The Court shall initially have jurisdiction over the interpretation and application of the Treaty.
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."
6. Article 30 entitled "Reference by Legal and Natural Persons", made provision for the category of persons who are eligible to bring References before the Court and the cause of action. It read:
"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, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."
7. The Partner States amended the Treaty on the 14th December, 2006 and 20th August, 2007, respectively, and introduced the amendments that form the first part of the subject of this Reference, namely, the proviso to Article 27(1) and Article 30(3) of the Treaty. The proviso to Article 27(1) reads:
"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 to the Organs of Partner States."
The new clause (3) to Article 30 reads:
"3. The Court shall have no jurisdiction under this Article where an Act, regulation, directive, decision or action has been reserved under the Treaty to an institution of a Partner State."
8. On the 3rd March 2004, the Partner States concluded the Customs Union Protocol. The Protocol came into force on the 1st January, 2005. Article 24(1) (e) of the Customs Union Protocol established the East African Community Committee on Trade Remedies and vested it with the jurisdiction for dispute settlement in accordance with the East African Customs Union (Dispute Settlement Mechanism) Regulations.
9. On 20th November 2009, the Partner States concluded the Common Market Protocol. Article 54 (2) thereof provides as follows:
"Settlement of Disputes
1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.
2. 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."

**The Applicant's Case**

10. In the Reference, the Applicant states that, during the course of its work, it discovered that the East African Community Summit had amended Chapter 8 of the Treaty in particular, by introducing a proviso to Article 27(1) and creating Article 30(3) and had also concluded the East African Community Customs Union Protocol and the East African Community Common Market Protocol.
11. The Applicant avers that the amendments to the Treaty and the dispute settlement mechanisms provided for in the two Protocols, deny original jurisdiction to the EACJ, from handling disputes arising from the Protocols contrary to the expectations of the Treaty.
12. The Applicant further asserts that the above actions, in as far as they limit/oust the jurisdiction of the EACJ, are contrary to the provisions of the Treaty and in particular that:
    i) The proviso to Article 27(1) and clause (3) to Article 30 , in as far as they grant concurrent jurisdiction to organs of Partner States and take away the supremacy of the EACJ in regard to interpretation of the Treaty, gravely contradict and infringe Articles 5,6,8(1),(4) & (5), 23,33(2) and 126 of the Treaty.
    ii) The negotiation and conclusion of the East African Customs Union Protocol, specifically Annex IX and Article 54(2) of the Common Market Protocol, in as far as they do not grant original jurisdiction of handling disputes to the EACJ, infringe Articles 5, 6, 8(1), (4) &(5), 23, 27(1), 30(1), (3) 33(2) and 126 of the Treaty.
13. From the accompanying affidavit dated the 24th November 2011, sworn on behalf of the Applicant by its researcher, one Henry Owoko, the main thrust of the Applicant's case is that the impugned amendments to the Treaty and the dispute settlement mechanisms provided for in both Protocols, limit / deny jurisdiction to the EACJ by transferring matters reserved for the EACJ under the Treaty to Partner State institutions and organs.
14. The Applicant further contends that the act of granting national Courts concurrent jurisdiction with the EACJ to interpret the Treaty, is likely to lead to conflicting interpretation of the Treaty by national courts; and thereby diluting the special jurisdiction donated by the Treaty to the EACJ.
15. The Applicant asserts that the action of amending the Treaty by introducing the proviso to Article 27(1) and Article 30(3) is a measure likely to jeopardize the achievements of the objectives of the Community stipulated under Article 5 of the Treaty.
16. The Applicant further asserts that its lawyers have advised, and it verily believes, that the amendments to the Treaty, in particular in Chapter 8 Article 27 (1) and Article 30 (3), were done without adequate consultations and are an infringement to Articles 5, 6, 8(1), (4) & (5), 23, 33 (2) and 126 of the Treaty.

17. Mr Owoko avers in his affidavit that he has read the two Protocols and has discovered that both of them do not grant original jurisdiction to the EACJ regarding matters therein.
18. The Applicant contends that the EACJ is an international Court that was put in place, not as an afterthought, but as an important court for fostering the East African Community Integration process. That the above actions will lead to disjointed application of the East African Law and further delay in the integration process if they are not revisited.
19. Finally, it is the Applicant's contention that the presence of the proviso to Article 27(1) and Article 30(3), plus the dispute settlement mechanisms in the said Protocols, are contrary to the expectations and aspirations of the people of East Africa.
20. For the reasons above, the Applicant seeks the following declarations and orders from the Court:
    i) That the proviso to Article 27 and Article 30(3) of the EAC Treaty contravene Articles 5,6,8(1),(4) & (5), 23,33(2) and 126 of the Treaty.
    ii) That the dispute settlement mechanism provided for in the Customs Union Protocol and the Common Market Protocol contravene Articles 5, 6, 8(1), (4) &(5), 23, 27(1), 30(1)&(3), 33(2) and 126 of the Treaty.
    iii) That the Respondent makes appropriate amendments to the Treaty and Protocols to cure the defects identified in this Reference.
    iv) That the costs of and incidental to the Reference be met by the Respondent.
    v) That the Honourable Court be pleased to make such further or other orders as may be necessary in the circumstances.

**The Respondent's Case**

21. As can be gathered from the response filed on the 16th of January 2012 and the affidavit of Dr. Julius Tangus Rotich, the then Deputy Secretary General (Finance and Administration) of the Community, filed together with the Response, the Respondent admits the amendments to the Treaty and their contents. The Respondent also admits the conclusion of the two Protocols by the Partner States of the Community as well as the establishment of the dispute resolution mechanisms complained of by the Applicant. However, the Respondent denies the legality of the claims advanced by the Applicant and contends as follows:
22. That the jurisdiction of the Court is limited to the interpretation and application of the Treaty, provided that such jurisdiction does not extend to the application of any interpretation to jurisdiction conferred by the Treaty on organs of a Partner State. Therefore, the amendments do not infringe on the jurisdiction of the EACJ as currently provided in the Treaty or at all.
23. That the negotiation and conclusion of the said Protocols were based on Article 151 of the Treaty that empowers the Partner States to conclude such protocols as may be necessary in each area of cooperation for purposes of spelling out the objectives and scope of, and institutional mechanisms for cooperation and integration.
24. That the Protocols were negotiated and concluded by the Partner States for purposes of spelling out the objectives and scope of, and institutional arrangements under Articles 75 and 76 respectively and are to that extent in conformity with the Treaty.

25. That the Partner States, while negotiating and concluding the said Customs Union Protocol observed that the Court lacks jurisdiction on trade disputes such as those arising from the application of the rules of origin; anti-dumping practices; subsidies and countervailing measures; safeguard measures; and specialized dispute settlement as well as trade disputes that may arise under the Customs Union Protocol and the Common Market Protocol.
26. That due to lack of jurisdiction of any tribunal at the regional level, provisions had to be made for appropriate mechanisms to handle disputes arising out of the implementation of both the Customs Union Protocol and the Common Market Protocol .
27. Lastly, that the mechanism for dispute settlement provided for under Article 24 of the Customs Union Protocol is in harmony with the World Trade Organisation (WTO) Agreements to which the Partner States are signatory.

**Points of Agreement**

28. Arising from the above pleadings, at the scheduling conference held in this Court on 30th April 2012, the parties agreed:
    1. That the Treaty was amended to create *inter alia* a proviso to Article 27(1) and Article 30(3).
    2. That Article 24(1) of the Customs Union Protocol establishes an East African Community Committee on Trade Remedies and vests it with dispute settlement rules in accordance with the East African Customs Union (Dispute Settlement Mechanism) Regulations.
    3. That Article 54(2) of the Common Market Protocol provides that Partner States shall guarantee in accordance with their Constitutions, national laws and administrative procedures that, "a competent judicial, administrative or legislative authority shall rule on the rights of the person who is seeking redress" for infringement on rights under the Protocol.
    4. That the stated status of the parties is valid.
    5. That the Court has jurisdiction to determine the Reference.

**Issues**

29. The following issues were agreed upon for determination by the Court:
    (1) Whether the amendment of the Treaty to introduce a proviso to Article 27(1) and Article 30(3) is inconsistent with or in contravention of Articles 5, 6, 8(1),(4) & (5), 23,33(2) and 126 of the Treaty.
    (2) Whether the Customs Union Protocol and the Common Market Protocol in as far as they do not grant the East African Court of Justice jurisdiction of handling disputes arising from the implementation of these Protocols infringe Articles 5, 6, 8(1), (4) &(5), 23, 27(1), 30(1),(3) 33(2) and 126 of the Treaty.
    (3) Whether the Applicant is entitled to the declarations sought

**Determination of the Issues by Court**

Applicable Rules and Principles of interpretation

30. The Treaty is an international treaty and is subject to international law on the

interpretation of treaties specifically, the Vienna Convention on the Law of Treaties. The relevant Article to this Reference is Article 31, which sets out the general rule of interpretation of treaties. Article 31 (1) provides 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."

31. In determining the Reference, we shall proceed to apply the above principles to the issues raised by the parties before us, and we shall take into account the fact that we have to interpret the provisions of the Treaty not only in accordance with their ordinary meaning, but also in their context and in light of their objectives and purpose. In addition, we shall, in so doing and in order to appreciate the contention by the Applicant, adopt the approach suggested by Counsel for the Applicant:
    i) By examining the relevant provisions of the Treaty prior to the introduction of the proviso to Article 27(1) and the addition of Article 30 (3); as well as the creation of the dispute settlement mechanisms under the Customs Union Protocol and the Common Market Protocol.
    ii) Then we shall proceed to examinine the said provisions of the Treaty as they are now, after the amendments and the conclusion of the two Protocols.

    Issue No. 1- Whether the amendment of the Treaty to introduce a proviso to Article 27 and Article 30(3) is inconsistent with and/or in contravention of Articles 5, 6, 8(1),(4),8(5),23, 33(2) and 126 of the Treaty.
32. Under this issue, the Applicant's contention is that the proviso to Article 27(1) and Article 30(3) in so far as they grant concurrent jurisdiction to the organs of the Partner States take away the supremacy of the EACJ with regard to the interpretation of the EAC Treaty.
33. Mr. Francis Gimara, the learned Counsel for the Applicant, submitted that the Treaty establishes the EACJ as the primary dispute resolution body for the implementation of the Treaty and all protocols made thereunder. That Article 23 established the EACJ as the judicial body to ensure adherence to law in the interpretation and application of, and compliance with the Treaty. That the import of Article 23 buffered with the original Articles 27 and 30 as well as Article 33, is to avoid conflicting treaty interpretation by national courts as a crucial step in ensuring the effectiveness of Community law. That if Community law is to be effective, it must be applied uniformly throughout the Member States and the final word in its interpretation must rest with the EACJ.The clothing of the EACJ with original jurisdiction to determine disputes arising from the interpretation and application of the Treaty, is a natural and logical extension of the need to ensure the uniformity of the application of the Treaty provisions throughout the Member States, for it is this uniformity which promotes the stable economic environment upon which everything depends. He added that the primacy of the EACJ in Treaty interpretation can be discerned from Articles 5,6,8(1),(4) & (5), 23 and 33(2).
34. He further submitted that the nature of the legal order is supremacy of the EACJ and not equality as the proviso to Article 27(1) and Article 30(3) seem to provide. In support of his submission, he relied on excerpts from (a) *Prof. Peter Anyang' Nyongo and Others v Attorney General of Kenya and Others, EACJ Ref. No. 1 of 2006; (b) The*

*East African Law Society and Others v Attorney General of Kenya, EACJ Ref. No. 3 of 2007; (c) Costa v ENEL [1964] ECR 585*.

35. He also argued that under the Treaty, national courts at all levels are free to make references and wait for answers for questions they refer to the EACJ. That remedies and procedural rules should be scrutinized by the EACJ to ensure that they do not unduly impede the effective exercise of Community rights. If they do so, the national courts must not apply them. In this way, both the national courts and the EACJ will be working in conjunction, to promote that environment of stability and predictability, which investors and individuals require in order to participate fully in the integration process. In his view, the granting of concurrent jurisdiction on Treaty interpretation to national courts will detract from and diminish the essential aspect of the EACJ as the final and only body with the responsibility to interpret and apply the provisions of the Treaty.
36. He added that some aspects of the impugned amendment will have the effect of completely undermining the legal assumptions upon which the single economic space envisaged in the Treaty is based, namely, the resolution of disputes by law, legal process and above all, by an independent judiciary.
37. Lastly on this issue, Mr. Gimara submitted that even the process of amending the Treaty was found by the Court to be irregular for not being consultative enough. If wide consultations had been carried out in the manner expected by the Treaty, the proviso to Article 27(1) and Article 30(3) would never have been in the Treaty because they fundamentally contradict the harmony of intention of the framers of the Treaty expressed in 5,6,8(1),(4) & (5), 23, 27 and 33(2). He urged the Court to strike out the amendments since their foundation was weak.
38. Mr. Wilbert Kaahwa, learned Counsel to the Community, submitted that the EACJ is indeed established under Articles 23(1) and 27(1) as a judicial body to ensure adherence to law in the interpretation and application of the Treaty. He emphasized that the EACJ lacks jurisdiction in trade disputes such as those arising on application of rules of origin; ant-dumping practices; subsidies and countervailing measures; safeguard measures and dispute settlement.
39. He contended that the jurisdiction of the EACJ is not as wide as the Applicant pleads and shall only be extended after a protocol to that effect is concluded. Until then, the EACJ only has jurisdiction in ensuring adherence to the law in the interpretation of the Treaty in the following specific matters:
    a) Disputes between the Community and its employees arising from the terms and conditions of employment or interpretation and application of the Staff Rules and Regulations (Article 31);
    b) Disputes arising out of an arbitration clause contained in a contract or agreement, which confers such jurisdiction on the Court to which the Community or any of its institutions is a party (Article 32(a));
    c) Disputes between Partner States regarding the Treaty if the dispute is submitted to it under a special Agreement (Article 32(b);
    d) Disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court (Article 32 (c)).

40. He added that Articles 33 and 34 of the Treaty in any case, do provide for avoidance of conflict, that there is even no proof, let alone pleading, that the proviso to Article 27(1) and the introduction of Article 30(3) have adversely affected the spirit and usefulness of the two Articles.
41. Mr. Kaahwa contended that the amendment was effected in accordance with the provisions of Article 150 of the Treaty and was meant to cover a void arising out of the limited jurisdiction of the EACJ pursuant to Articles 23(1) and 27(1). The amendments thus did not take away the supremacy of the EACJ or limit / oust its jurisdiction as alleged by the Applicant. The jurisdiction remained intact. That the proviso to Article 27(1) takes into account the fact that as the EAC grows and the EACJ also grows, and before the protocol on the extended jurisdiction of the EACJ is concluded, there should not be a legal vacuum.
42. He argued that a reading of Article 27 as a whole shows that the EACJ does not have unlimited jurisdiction by the manner in which Article 27 was couched by the parties to the Treaty. That the EACJ can only exercise the jurisdiction conferred upon it by the Treaty. That the Applicant's conceptualization of "wide jurisdiction" and "parallel dispute resolution" does not have a basis in law. Further, the fact that the said proviso circumscribes the jurisdiction of the EACJ to interpret does not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of the Partner States. (See: *EACJ Appeal No.1 of 2011, The Attorney General of Kenya v Independent Medical Legal Unit and EACJ Appeal No. 3 of 2011, The Attorney General of the United Republic of Tanzania v the African Network for Animal Wefare, ("the ANAW" case.*)
43. Regarding Article 30(3), Mr. Kaahwa again relied on the *ANAW case (supra)* and contended that the Appellate Division's reasoning in that case was that in the presence of an express provision in the Treaty which reserves jurisdiction to Partner States or their institutions, then the jurisdiction of the EACJ is automatically limited. That the introduction of Article 30(3) was effected by taking into account the circumstances of the EACJ and principally the current jurisdiction. (See: *EACJ Ref. No. 3 of 2007, The East African Law Society and Ors v The Attorney General of Kenya read together with ANAW.*)
44. Mr. Kaahwa also distinguished the case of *Flamino Costa v ENEL (supra)*, arguing that unlike that case, this Reference does not deal with a conflict between Treaty provisions and national law.
45. Therefore, the amendments did not infringe the Treaty provisions mentioned in the Reference.
46. In his rejoinder, Mr. Gimara urged the Court in interpreting the Treaty provisions in this Reference, to also take into account the spirit of the Treaty and to ensure that the interpretation does not cause any absurdity, as was observed in the Oils Platforms case of the ICJ 1993/6- Iran. He emphasized that the purpose of Article 23 was to create the EACJ as the judicial body to ensure adherence to law in the interpretation and application of, and compliance with the Treaty.
47. Mr. Gimara disagreed with Mr. Kaahwa that there was a legal vacuum in the Treaty that necessitated the impugned amendments. He asserted that, the only legal vacuum is the deliberate delay by the Partner States in concluding the protocol to extend the

jurisdiction of the EACJ under Article 27(2).

48. On the question of supremacy, Counsel submitted that the Court stated so in *The East African Law Society v The Attorney General Of Kenya, EACJ Ref. No. 3 of 2007*, and this is also what the *ENEL case (supra)* brings out.
49. Mr. Gimara asserted, in response to Mr. Kaahwa's reliance on *The Attorney General of Kenya v Independent Medical Legal Unit, EACJ Appeal No.1 of 2011*, that the jurisdiction of the EACJ is clearly stated by the Treaty provisions discussed above, therefore the subsequent amendments to include the proviso to Article 27(1) and the introduction of Article 30(3) are unwelcome intrusions into this jurisdiction as they contravene the Articles of the Treaty mentioned.
50. On the *ANAW case*, Mr. Gimara contended that the facts of that Reference are different from the instant one in that the Applicant is , unlike the case was in that Reference, challenging the introduction of Article 30(3) into the Treaty to deny the EACJ supreme jurisdiction. He reiterated his earlier prayers.
51. We have carefully considered the pleadings and submissions on this issue and our findings and conclusions are the following:
    First, we find no dispute that the jurisdiction of this Court as spelt out under the provisions of Articles 23 read together with the original Article 27 (1) was "initially over the interpretation and application of this Treaty".
    The use of the word "over", in Article 27(1), by the framers of the Treaty is in our view, not an afterthought. We think that it was deliberately and carefully chosen to mean "supremacy" in matters of the interpretation and application of the Treaty by the EACJ, the only judicial organ of the Community under the Treaty. It should also be noted that Article 23 is a fundamental Article of the Treaty which creates the EACJ as one of the organs of the Community under the Treaty, in the same way the other organs such as the East African Legislative Assembly (EALA), are created.
52. Notwithstanding this clear provision of the Treaty, we note that although the EACJ had the primacy and supremacy over the interpretation of the Treaty, Article 33 of the Treaty, which is entitled "Jurisdiction of National Courts", indicates that national courts also had some form of jurisdiction in interpretation of the Treaty even before the impugned amendments. Nevertheless, the issue was explained by the Court in the celebrated authority of *Professor Anyang' Nyongo and Others vs The Attorney General of Kenya and Others, EAC Ref. No. 1 of 2006* at page 20 of the judgment where the Court observed that:
    "Under Article 33(2), the Treaty obliquely envisages interpretation of the Treaty provisions by national courts. However, reading the pertinent provisions with Article 34, leaves no doubt about the primacy if not the supremacy of this Court's jurisdiction over the interpretation of provisions of the Treaty."
53. For clarity, it is useful to reproduce the two Articles in full. Article 33 provides as follows:
    "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 the decisions of the national courts on a similar issue."

Article 34 reads:

"When a question is raised before a national 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 the ruling is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the question."

54. To that extent, we find that the jurisdiction of the EACJ was, prior to the impugned amendments, wide and unlimited as Counsel for the Applicant has submitted.
55. On the other hand, we find that after the introduction of the amendments, the jurisdiction of the EACJ is limited because, one, under the proviso to Article 27(1), the Court's jurisdiction now excludes matters:

"….where jurisdiction is conferred by the Treaty on organs of Partner States."

This means that under the Treaty, jurisdiction can now be conferred on organs of the of the Partner States, yet the "organs" of Partner States are not defined in the Treaty. The proviso is therefore vague and inconsistent with the provisions of the Treaty. It also means that, Community law can be applied in the Partner States without any supervision by the judicial organ of the Community, namely, the EACJ. Therefore, this act alone flies in the face of Articles 23 and 27.

Two, under Article 30(3), the jurisdiction of the EACJ is now excluded:

"where an Act, regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State."

The same argument applies to this amendment. It is not only vague, but it means an institution of a Partner State can interpret the Treaty as the EACJ sits idly by.

56. It is, therefore, clear from the foregoing that although the impugned amendments did not take away or oust the jurisdiction of the EACJ, they undermined the supremacy of the EACJ as the judicial body whose responsibility is to ensure adherence to law in the interpretation of the Treaty as per Article 23. It is thus our humble view that the greatest caution and restraint ought to have been exercised by the Partner States in introducing the impugned amendments because the dream of the framers of the Treaty was clearly that the interpretation of the Treaty was to be a preserve of the Community's judicial body, namely, the EACJ.
57. We further do not share the view of the Respondent's Counsel on the legal vacuum that purportedly necessitated the kind of amendment that was introduced under Articles 27(1) and 30. We instead agree with Applicant's counsel that the legal vacuum was created by the delay in concluding the protocol for the extended jurisdiction of the EACJ, and the amendments did not fill the same. To that extent, it is safe to conclude that the act of amending the Treaty in Article 27(2) and 30(3) is actually inconsistent with the Treaty, since it was retrogressive and did not fill the vacuum created by Article 27(2).
58. It also our finding that the amendment to Article 27(1) created a window for the amendment of the Treaty or conclusion of protocols conferring the jurisdiction to interpret the Treaty on organs of Partner States to the exclusion of the EACJ. The amendment to Article 30(3) indicates that an institution of a Partner State can now handle references brought by legal or natural persons directly, under Article 30 of the Treaty, if such jurisdiction is conferred on it by a Partner State. There is no doubt

in our minds that this is likely to undermine the jurisdiction of the EACJ, since the EACJ will be powerless over such institutions. It is thus inconsistent with the object and the spirit of the Treaty in the Articles mentioned in this Reference.

59. Another argument by Mr. Kaahwa is that there is no pleading let alone proof by the Applicant, that the impugned amendments have adversely affected the spirit and usefulness of Articles 33 and 34. This argument is untenable, with due respect to the learned Counsel.
60. It should not also be a consolation because, in a situation where the impugned amendments now empower the five Partner States to confer on their various national organs and institutions jurisdiction to interpret the Treaty, surely, the fear that these amendments are likely to lead to the issuing of conflicting decisions among themselves, let alone with the EACJ, cannot be farfetched. Moreover, the situation is bound to be compounded, since there is a high possibility of an increase in the number of Partner States of the Community in future when the other neighbouring countries in the East African Region join the Community. In the *Costa vs. ENEL case (supra)*, the ECJ noted that:
"The executive force of the Community law cannot vary from one state to another in deference to subsequent domestic laws without jeopardizing the attainment of the objectives of the Treaty…"

**We agree.**

61. We note that the purpose of Articles 33(2) and 34 reproduced earlier on is to, *inter alia*, ensure uniform interpretation and avoid conflicting decisions and uncertainty in the interpretation of the Treaty. However, the effect of the two amendments is likely to defeat or diminish the attainment of the above purpose, since the Partner States will now be in a position to confer jurisdiction directly to those organs and institutions, because of the impugned amendments. Additionally, the national courts will no longer have to refer all question to the EACJ for Preliminary Ruling under Article 34, once they have been clothed with jurisdiction over certain matters under the proviso to Article 27, further undermining the jurisdiction of the EACJ.
61. The claim by the Applicant that the implementation of the amendments is likely to undermine the objectives of the Treaty, in particular Articles 5 and 6 are not fanciful either. This is because, despite the undertaking by the Partner States under Article 27(2) that:
"2. 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."
62. It is in the public domain that, although, the Partner States made that undertaking on 30th November, 1999, when they signed the Treaty, to- date, the Partner States have not concluded the Protocol for the extended jurisdiction of the Court. Instead of that, the Partner States came up with the impugned amendments, which have the contrary effect of undermining, as opposed to extending the jurisdiction of the Court, in clear breach of the objectives of the Treaty.
63. In *Hon. Sitenda Sebalu v The Secretary General of the EAC, EACJ Ref. No. 1 of 2010*, this Court took was alive to this fact and noted 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 27(2) of the Treaty clearly demonstrates."

The Court held, *inter alia*, that:

" The delay in extending the jurisdiction of the Court not only holds back and frustrates the conclusion of the Protocol but also jeopardizes the achievement of the objectives and implementation of the Treaty and amounts to an infringement of Article 8(1) ( c ) of the Treaty and contravenes the principles of good governance as stipulated by Article 6 of the Treaty".

We share the same view.

64. Further, Mr. Owoko in paragraph 7 of his affidavit, deponed that the amendments were done without adequate consultation, according to information from his lawyers. We found no rebuttal to this statement in the affidavit of Mr. Rotich referred to earlier on in this judgment. Rule 43 of the Rules of the Rules of this Court provides that:

"1. Any allegation of fact made by a party in a pleading shall be deemed to be admitted by the opposite party unless it is denied by the opposing party in the pleading.
2. A denial shall be made either by specific denial or by a statement of non-admission and either expressly or by necessary implication.
3. Every allegation of fact made in a pleading which is not admitted by the opposite party shall be specifically denied by that party; and a general denial or a general statement of non-admission of such allegation shall not be sufficient denial."

We would have expected the Respondent to tender evidence showing that the process of amending Articles 27 and 30 was a consultative one and in accordance with Article 150. If such records exist, this was the time to scrutinize them. None was availed to us.

65. It is, therefore, justified for this Court to conclude that the amendments were actually made without adequate consultation; which is in itself, an infringement of one of the operational principles that are supposed to govern the objectives of the Community set out under Article 7 of the Treaty, namely, a "people-centered" cooperation.

66. Further still on this point, in the *East African Law Society & Others v Attorney General of Kenya & Others, EACJ Ref. No. 3 of 2007*, the Court held at page 42 of the judgment that :

"The lack of people's participation in the impugned amendment process was inconsistent with the spirit and the intendment of the Treaty in general, and that in particular, it constituted infringement of the principles and provisions of Article 5(3) and 7(1) (a)."

67. In concluding this issue, we would like to echo the statement by the Court in the *East African Law Society (supra)* that:

"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 contradicting the main provision. It should be appreciated that the question of what "the Treaty reserves for a Partner States" 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 national courts of the Partner States.

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

We need not say more.

**Issue No. 2.**

Whether the Customs Union Protocol and the Common Market Protocol in as far as they do not grant the EACJ jurisdiction of handling disputes arising from the implementation of the Protocols infringe Articles 5, 6, 8(1), (4), (5), 23, 27(1),30(1) , 33 (2) and 126 of the Treaty.

68. The cause of disagreement under this issue as can be discerned from the pleadings and submissions on record as being: (a) whether the Protocols do not grant or oust the jurisdiction of the Court from handling disputes there under; and (b) if so, whether they infringe the provisions of the Treaty mentioned.

69. The starting point, in our view, is the provision of the Treaty under which the Protocols were concluded. It is not in dispute that they were concluded under Article 151(1) of the Treaty, which provides that, the Partner States:

"1. shall conclude such Protocols as may be necessary in each area of cooperation which shall spell out the objectives and scope of and institutional mechanisms for cooperation and integration."

The Partner States were thus well within their rights to conclude the said Protocols.

70. Article 151(4) of the Treaty goes further to provide that:

"4. The Annexes and Protocols to this Treaty shall form an integral part of this Treaty."

It follows from the above provision of the Treaty, therefore, that the Customs Union Protocol and the Common Market Protocols are now integral parts of the Treaty. Article 33(2) establishes the supremacy of the decisions of the Court on questions of interpretation and application of the Treaty. Article 38(1) further provides that disputes concerning the interpretation or the application of the Treaty shall not be subjected to any method of dispute settlement other than those provided in the Treaty. In the interpretation provisions, Article 1 provides that: "Treaty" means "this Treaty for the Establishment of the East African Community and Annexes and Protocols thereto." In the same article, "Protocol" means any "agreement that supplements, amends or qualifies this Treaty."

71. This means that the Court has the role and jurisdiction to interpret and apply the provisions of the two Protocols as well, pursuant to the Court's jurisdiction under Articles 23 read together with Article 27 (1) of the Treaty. Consequently, the answer to question (a) above is that the provisions of the protocols did not oust the jurisdiction of the EACJ from handling disputes arising from the implementation of the said Protocols.

72. We are fortified in this conclusion from the law that jurisdiction is a creature of statute and can only be removed by an express provision of the law. According to The

Dictionary of Words and Phrases Legally Defined (edited by John B. Saunders, 2nd Edition, and Volume 3 at p. 113) relied on by Mr. Kaahwa, "jurisdiction " means:
"The authority which a court has to determine matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted, and may be extended or restricted by like means."

73. As submitted by Mr. Kaahwa, this power of a court to hear and decide a case was emphasized in *R. vs Kent Justices ex parte Lye[1967] 2 QB 153; Union Transport Plc vs Continental Lines SA[1992] 1 WLR 15 and by this Court in EACJ Ref. No. 1 of 2008: Christopher Mtikila vs The Attorney General of The United Republic of Tanzania; EACJ Ref. No. 1 of 2008: Modern Holdings (EA) Ltd vs Kenya Ports Authority and EACJ Ref. No. 1 of 2010 Hon. Sitenda Sebalu vs The Secretary General of the EAC & 3 Others*. It therefore follows from the above authorities that the jurisdiction of the Court is specifically created and can only be extended or ousted pursuant to the provisions of Article 27 of the Treaty, and not by implication.
74. On this issue, we were also referred to Article 24 of the Customs Union Protocol, which establishes an East African Community Committee on Trade Remedies and vests it with dispute settlement rules in accordance with the East African Community Customs Union (Dispute Settlement Mechanisms) Regulations.
Article 24(1) confers on the Committee On Trade Remedies, the jurisdiction to handle matters pertaining to: "the rules of origin, anti-dumping measures, subsidies and countervailing measures, safeguard measures, dispute settlement provided for under the East African Customs Union (Dispute Settlement Mechanisms) Regulations specified in Annex IX to the Protocol and any other matter referred to the Committee by the Council."
75. While we agree that Article 24 does not mention the Court anywhere, it is evident that, in the course of exercising its mandate, an issue may arise before the Committee which requires the interpretation of the Treaty. In our view, nothing would prevent an aggrieved natural or legal person from referring such a dispute to this Court for interpretation directly under Article 30(1) in order to determine 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".
76. In the case of the Common Market Protocol, Article 54 provides that:

**"Settlement of Disputes**

1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.
2. 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."

77. It is clear from Article 54(1) that disputes between Partner States over the interpretation of the Treaty remain governed by the Treaty, which means that this Court is primarily the one vested with jurisdiction over such disputes. This means that the Protocol does not oust the jurisdiction of the Court entirely.
78. We, note that at the same time, the Common Market Protocol also affords under Article 54(2) opportunity to persons who feel that their liberties recognized under the Protocol have been infringed upon by persons acting in their official capacities, to seek redress from their competent judicial, administrative, legislative or other authorities.
79. While this would appear as if it is a parallel dispute resolution mechanism under the Treaty complained about in this Reference as argued by Mr. Gimara, our view is that, these dispute resolution mechanisms are merely alternative dispute resolution mechanisms intended for the speedy and effective resolution of trade disputes by experts in technical and specialized areas. Otherwise, the Court would be bogged down with the nitty gritty of disputes such as those in the area of trade, customs immigration and employment that are bound to arise on a regular basis as the integration process deepens and widens as a result of the implementation of the Protocols.
80. More importantly to this Reference, in our view, is the undertaking under Article 8(4), of the Treaty, which provides that:
"4. Community organs, institutions and laws shall take precedence over similar national ones on matters pertaining to the implementation of this Treaty".
The EACJ is an organ of the Community established under Article 9 of the Treaty. For that reason, the EACJ takes precedence over national courts or institutions on matters pertaining to the implementation of the Treaty.
81. Specifically, and with regard to the requirement of harmonization of activities in legal and judicial affairs under Article 126, we are of the firm view that the amendments and the establishment of specific dispute settlement mechanisms is unlikely to have any adverse bearing on the Court's discharge of its functions as provided for under Article 23(1) and 27(1) of the Treaty.
82. Even further, we note that the duty imposed on national courts by Article 34 of the Treaty which provides that where questions arise requiring interpretation of the Treaty, the court or tribunal may refer such a question for interpretation and a Preliminary Ruling to this Court, also applies to disputes that may arise under the two Protocols.
83. We are also in agreement with Mr. Kaahwa's argument that the Council is empowered under Articles 75(3) and 76(3) of the Treaty, to establish and to confer powers and authority upon such institutions as it may deem necessary to administer the Customs Union and the Common Market Protocol. Therefore, the creation of the Customs Union and the Common Market pursuant to Articles 75, 76 and 151 of the Treaty do not in any way jeopardize the achievement of the objectives or the implementation of the provisions of the Treaty. This is primarily because their very existence was envisaged under Articles 2(2), 5(2), 151, 75 and 76 of the Treaty. If anything, their establishment and powers and authority conferred upon them in order to discharge their mandate is in effect an actuation of the objective under Article 5(2). It cannot

therefore be said to infringe Articles 5, 6, 8(1), (4) &(5), 23, 27(1), 30(1),(3) 33(2) and 126 of the Treaty.

84. This is what the Court observed recently, on this issue in *The East African Law Society v The Secretary General Of the East African Community, EACJ Reference No. 1 of 2011*, at page 21 of the judgment:

"... it is also clear to us , and we have no doubt in our minds, that Articles 75 and 76 of the Treaty do not provide for setting up of judicial mechanisms to the exclusion of the Court, but only institutions Council may deem necessary to administer the Customs Union and the Common Market Protocol. We would imagine that these are Community institutions because we do not think that the Council would establish national institutions. Even then, national institutions clothed with authority to administer the Customs Union and the Common Market Protocol, are obligated to do so in accordance with the Principles and objectives of the Treaty, as if they were institutions of the Community. In any event, the Treaty is law applicable in each Partner State. What is clear to us, from the reading of the above, is that the establishment of the said institutions and the conferring power upon them is not a mandatory requirement upon Council; it may or may not establish them."

85. The Court went on to observe that:

'During the hearing, we were not told, nor did we find that jurisdiction to interpret the Protocols is conferred upon any known organ in a Partner State pursuant to Article 27(2) of the Treaty. We are therefore of the firm view that they came under Article 27(1) of the Treaty.

In the premises, we find that it is not necessary to first extend the jurisdiction of this Court, as overemphasized by the Respondent, in order for it to have jurisdiction over disputes arising from the interpretation of both Protocols."

We hold the same view in this Reference.

86. We also agree with Mr. Kaahwa's submission that the provision of specialized dispute resolution mechanisms, especially on technical matters, is not unique to the East African integration process. It is also not strange to international trade and dispute settlement. It is prevalent and common to all countries that have subscribed to multilateral trading arrangements. For instance, notwithstanding the existence of jurisdictions of national/municipal commercial courts of competent jurisdiction, members of the World Trade Organization (WTO) including the EAC Partner States, have subscribed to the WTO Dispute Settlement process provided under Articles XXII and XXIII of the General Agreement on Tariffs and Trade ( GATT). In so doing, the Partner States cannot be accused of having divested this Court of jurisdiction.

87. On the other hand, we respectfully disagree with the assertion by Mr. Kaahwa that Articles 24 (1) and 54(2) of the Custom Union and The Common Market Protocols, respectively, were concluded to cater for the lack of jurisdiction of the EACJ. As already discussed, the EACJ derives its jurisdiction from Article 23 and the original Article 27(1) of the Treaty which includes all annexes and protocols negotiated to implement the Treaty. As such, there was no "vacuum" as far as the jurisdiction of the Court is concerned. As stated earlier in this judgment, our view is that, the mechanisms were created for administrative expedience, and if any vacuum exists in

the Treaty then it is the absence of the protocol for the extended jurisdiction of the EACJ more than a decade after the conclusion of the Treaty.

88. We also find that the dispute resolution mechanisms under the two Protocols do not jeopardize in any way the achievements and objectives of the Treaty, given that Articles 33(2) and 34 may cure any conflicting interpretation by national courts or tribunals since the Court's decision will prevail over the ones of national courts over similar issues.
89. Mr. Gimara's other argument was that the action of leaving out the EACJ from any active role in Customs and Common Market matters (both treaty matters) and vesting the same with national institutions without even creating a right of appeal, is clearly, giving room and space for municipal jurisdictions to override international law bodies created by the Treaty. That this is what Article 26 of the Vienna Convention regarding the superiority of international law over municipal law seeks to avoid. Again, this issue was considered at length by this Court in the *East African Law Society vs The Secretary General of the EAC; Ref. No. 1 of 2011(supra)* and the eminent panel of judges of First Instance Division at page 22 of the judgment, made the following pertinent observation, which we quote in extenso:

    "Pursuant to Regulation 6(7) of Annex IX of the Customs Union, decisions emanating from these mechanisms are final. It is thus clear that when parties submit themselves to a particular dispute resolution mechanism, they also undertake that the decision emanating there from will be final except in case where a party wishes to challenge the decision of the Committee on grounds of fraud, lack of jurisdiction, and other illegality. This mechanism, in our view, represents a pragmatic approach to Customs dispute resolution, is an alternative to the long and often tedious court litigation approach. Much as we appreciate and support it, however, we do not think that it takes away, directly or by implication the interpretative jurisdiction of this Court."

    Our view remains the same as above on the issue.

    In conclusion, we answer Issue No. 2 in the negative.

    Issue No. 3 - Whether the Applicant is entitled to the Declarations sought.
90. Mr.Gimara urged the Court to grant the Applicant the declarations sought based on his arguments and the pleadings on record. Mr. Kaahwa contended, on the other hand, that the Applicant is not entitled to the declarations sought for the reasons already advanced. He urged the Court to dismiss the Reference with costs.
91. In light of our findings and conclusions in the foregoing issues, we find that the Applicant's Reference has partially succeeded in issue No. 1, but it has not made out a case of infringement of the Treaty provisions mentioned in issue No. 2.

    Consequently, we make the following declarations and order, in answer to issue No. 3:

    1. The proviso to Article 27(1) and Article 30(3) undermine the supremacy of the EACJ and therefore contravene Articles 5, 6, 8 (1), (4) & (5) and 23 of the Treaty.
    2. The dispute settlement mechanisms provided for under the Customs Union and the Common Market Protocol do not oust the original jurisdiction of the Court of handling disputes there under.
    3. Either party shall bear his or its costs, since this Reference falls in the category of public interest litigation.

    It is so ordered

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East African Court of Justice - Appellate Division
Application No. 2 of 2012

Arising from Appeal No. 1 of 2011

**Independent Medico Legal Unit And Attorney General of the Republic of Kenya**

H.R. Nsekela, P.; P. K. Tunoi, VP.; E. R. Kayitesi, L. Nzosaba, J. M. Ogoola, JJA
March 1, 2013

*Appellate Division cannot re-open the evidence - Appellate power is distinct from a power of review- Error apparent on the face of the record – Grounds for a review include a glaring omission or a patent mistake- Whether the Appellate Division should exercise its power of review in this case.*

*Articles: 23, 27, 35 (3), 35A of the EAC Treaty - Rule 72 of the Court's Rules of Procedure, 2010*

The Applicant / Appellant had brought a Reference in the First Instance Division of the East African Court of Justice concerning the Respondents responsibility to investigate, prosecute, punish and sanction the perpetrators of the atrocities committed in the Mt. Elgon area of Kenya between 2006 and 2009 their compensation. A ruling on a preliminary objection raised by the Respondent was given on 29th June 2011 and being dissatisfied the Appellant lodged Appeal No. 1 of 2011.

On 15th March 2012, the Appellate Division dismissed the appeal and upheld the preliminary objection raised by the Respondent. In the current application, the Applicant/Appellant sought to re-open and review the Appellate Division's judgment.

**Held:**

1) The Appellate Division of this Court, just like the First Instance Division enjoys, in appropriate cases, the same authority and power to review its own judgments as the power of review set out in Article 35(3) extends to both Divisions of this Court.
2) A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of error committed subordinate court. To qualify for review, an application needs to fulfil any or all the conditions specified in Article 35(3). The purpose of review is not to provide a back door method by which unsuccessful litigants can re-argue their cause. Review of a judgment will not be considered except where a glaring omission or a patent mistake or like grave error has crept into that judgment through judicial fallibility.However, parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the Court of the legal result
3) If a view held by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view (such as the ones

canvassed by the Applicant) was also possible.

4) The grounds adduced by the Applicant for this Court to review its judgment of 15th March 2012 could be good grounds for a further appeal but this is not provided for in the EAC Treaty. The application was therefore dismissed.

Cases cited:

Aribam Tuleshwar Sharma v Ariban Pishak Sharma, Supreme Court of India (1979) 45CC 389, 1979(11) UJ 300 SC

Dr. Kabeta Muleya v COMESA & Erastus Mwencha, COMESA Court of Justice, Revision Application No. 1/2002

Fawwcett Properties v Buckingham County Council (1960) 3 All E.R. 503 at 516)

Haridas v. Smt. Usha Rani Banik, Supreme Court of India, Appeal (civil) 7948 of 2004

Jasbir Singh Rai v Tarlochan Singh Rai, Court of Appeal, Kenya, Civil Application No. Nai. CA 307 of 2003 (154/2003)

Lakamshi Brothers v Raja & Sons [1966] EA 313

Murray v IRC, (1918) AC 541 at 553

Musiara Ltd v Ntimana [2005] EA 317

PTA Bank v Martin Ogang, COMESA Court of Justice, Reference Revision No. 1/2001

R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochete Ugarte (No. 20 [1999] 1 All E. R. 577

Rafiki Enterprises Ltd v Kingsway & Automart Ltd, Court of Appeal Kenya, Civil Application No. Nai.375 of 1996

Rupa Ashok Hurra v Ashok Hurra; Supreme Court of India Writ Petition (civil) 509 of 1997

Sewanyana v. Martin Aliker, Supreme Court of Uganda, Civil Application No. 4 of 1991

Smti Meera Bhanja v Smti Nirmala Kumari (Choudry) 1995 SC 455.

Somani v Shirinkhanu (No. 2) [1971] EA 79

Transport Equipment Limited v. Devra P. Valambhia, Court of Appeal of Tanzania, 1998 TLR 89

**Judgment**

1. The issue raised in this Application is relatively (but deceptively) simple – namely whether the Appellate Division of the East African Court of Justice ("EACJ") (i) has jurisdiction to review its own decisions, orders, rulings and judgments (hereinafter referred to collectively as "judgments"); and (ii) if so, whether in the instant Application the Court should exercise that power to review its previous judgment in this matter, dated 15th March 2012?
2. In that judgment of 15th March 2012, this Division dismissed the appeal of the then Appellant: Independent Medicol Legal Unit ("IMLU"), against the decision of the First Instance Division dated 29th June 2011, which upheld a preliminary objection raised by the then Respondent: the Attorney General of Kenya. The fine details of the underlying Reference in this matter are not relevant to the instant Application. Suffice to summarise that the case involves the responsibility of a Partner State under the Treaty for East African Integration ("The Treaty") to investigate, prosecute,

punish and sanction the perpetrators and compensate the victims of the atrocities committed in the Mt. Elgon area of Kenya during the 2006 - 2009 violent Sabaot Land rebellion in that area of Kenya.

3. In the course of hearing that Reference, the First Instance Division of this Court made a Ruling dated 29th June 2011, concerning the preliminary objection raised by the Attorney General of Kenya. Aggrieved by that Ruling, IMLU appealed to this Division of the Court. In its judgment of 15th March 2012, this Division upheld the Attorney General's appeal. It is this same judgment that IMLU now seeks the Court's indulgence to re-open and review. For this simple prayer, IMLU provided a long and formidable litany of justifying grounds – thirty grounds in all, namely:

1. "That there are errors apparent on the face of the record.
   a) That the Honorable Court erred in its Application of the principle of continuous violation and ongoing breach to the Treaty.
   b) That the Vienna Convention on the Law of Treaties provides that every International Convention must be deemed tacitly to refer to general principles of International Law for all questions which it does not itself resolve in express terms and in a different way.
   c) That continuous violation, ongoing breach and continuous situation are general principles of International Law.
   d) That a continuing violation, a continuing situation and ongoing breach all refer to the same circumstances.
   e) That the breaches of the Treaty set out in the Reference before the Court of first instance continues and/or have effects which themselves constitute violations to date.
   f) That the Treaty does not provide for nor does it exclude the general principles of continuous violation, ongoing breach and continuous situations.
   g) That the principle of continuous violation is a natural consequence of the Treaty Provisions.
   h) That the Honorable Court erred in its interpretation of the principles of continuous violation in the decision of the Inter Americana Court on Human Rights in Moiwana Community versus Suriname.
   i) That the Honorable Court ought to have applied liberal, purposive and broad principles in interpretation of the Treaty particularly Article 30 (2) and the principle of *pacta sunt servanda*.
   j) That the principle *expressio unius est exclusion alterium* is a general principle of international law.
   k) That the Honorable Court ought to have applied the principle of expression *unius est excusion alterium* in its interpretation of Article 30 (2) to exclude failures of omission by members of states from the time limit of two months.
   l) That the Honorable Court ought to have found that the knowledge referred to under Article 30 (2) only applied to a positive action and not an omission.
   m) That the Honorable Court out to have interpreted Article 30(2) in light of the Treaty as a whole and not in isolation.
   n) That the Honorable Court in interpreting Article 30(2) erred in strictly interpreting the time within which the Reference ought to have been filed.

o) That the Honorable Court ought to have applied a practical construction in interpreting Article 30(2) of the Treaty.
p) That in finding that the Reference was time barred this Honorable Court made findings of fact and thereby made errors of law by exercising powers outside its jurisdiction.

2. That the decision of the Court has caused injustice and will continue to cause injustice on the Applicant, the residents of Mt. Elgon District and people of the community.
   a) That the Honorable Court is a Court of Justice.
   b) That the Honorable Court placed an artificial limit on the time within which a natural person can move the Court to enforce the obligations of a Member State.
   c) That the Honorable Court has placed impractical and unreasonable limits on the enforcement of fundamental and operational principles of the Treaty by the people of the community.
   d) That the Honorable Court has by strictly interpreting Article 30(2) of the Treaty, shifted to the people of the community the burden of ensuring that Member States fulfill their obligations under the Treaty thereby occasioning substantial injustice.
   e) That by strictly construing the time limit under Article 30 (2) of the Treaty the Honorable Court has watered down the fundamental and operational principles under Articles 6 and 7 of the Treaty.
   f) That the Honorable Court ought to have interpreted the Treaty to give effect to its clear intention for member states to uphold the fundamental and operational principles of the Treaty.
   g) That the decision of this Honorable Court on what constitutes continuous violation and its Application to the Treaty is clearly wrong and productive of injustice and it is only right that this Honorable Court reverses it.
   h) That the interpretation of this Honorable Court on the Application of the principle of ongoing violation to Article 30(2) of the Treaty will set a precedent that may lead to injustice by unduly restricting the proper development of East African Community Law.
   i) That the decision of the Honorable Court will be the foundation upon which financial, commercial, and fiscal arrangements will be based and is likely to cause injustice.
   j) That the decision of the Honorable Court will lead to administrative and procedural difficulties in access to Justice for the people of the community.
   k) That the Honorable Court has limited access to Justice under Article 30 (2).
   l) That by applying a narrow interpretation to the Treaty the Court has caused injustice by restricting the rights of natural persons to bring a reference for breach of the Provisions of the Treaty.
   m) That the Honorable Court in failing to consider individually and in totality the written and oral submissions of the Applicant caused an injustice by failing to accord the Applicant a fair hearing."

4. Upon subsequent scheduling of the matter under Rule 99 of the EACJ Rules of

Procedure (the "Court Rules"), the Parties agreed to collapse all the above 30 grounds into only one issue for determination – namely: Whether the Application before this Court for review of the Court's earlier judgment was properly brought before the Court? The Parties and the Court understood that intrinsic in this one formulation of the issue were a number of sub-issues – including, in particular, whether the reference in the pleadings to Article 35 (2) was correctly cited; and whether the Application falls within the threshold of Article 35(3): both as a matter of merit, and as a matter of jurisdiction. In this regard, learned Counsel for the Attorney General (Mr. Ngugi) readily conceded the prayer by IMLU's counsel (Ms. Kilonzo) to amend the Application, from wrongly citing "Article 35(2)", to correctly citing sub-Article (3) of that Article 35 as the basis for this Application to review. With that concession, the Court readily and formally granted the Applicant's prayer for that particular amendment of their pleadings.

5. As regards substantive consideration of the Application for review, the Court needs to address two inter-related issues: first, does the Appellate Division of this Court have jurisdiction to review its own judgments; and secondly, is the instant Application a proper application for the Court to review its earlier judgment? The first issue arises out of Mr. Ngugi's objection to this Division's jurisdiction. The second issue derives from Ms. Kilonzo's several contentions to the effect that the Court's judgment was riddled with numerous errors apparent on the face of the record.

**Jurisdiction of Appellate Division**

6. We will start with the first issue – namely Jurisdiction of this Appellate Division of the Court. We do so knowing that without jurisdiction we cannot take even one further step in this matter.
7. Mr.Ngugi contended very vigorously that the Appellate Division, unlike the First Instance Division, lacks jurisdiction to review its own judgments. He stated that the Appellate Division's jurisdiction is limited to the appellate confines of Article 35A of the Treaty: Under that Article, the Appellate Division of this Court may entertain appeals from judgments of the First Instance Division only on:
   (a) Points of law;
   (b) Grounds of lack of jurisdiction; or
   (c) Procedural irregularity.
8. Mr. Ngugi emphasized the point that Article 35A constitutes the substantive jurisdiction of the Appellate Divisiion; and, therefore, that the Division will enter into a dispute or a matter only in the exercise of its appellate jurisdiction and no other. Mr. Ngugi buttressed his proposition on the premise that:
9. "Article 35A sets this Court as an Appellate jurisdiction Court, that matters that come before it are not or do not originate from it, they originate from the First Instance Division and once they have been received there, they come to the Appellate Court as the final Court. That is the design of the Treaty."
10. This Court is of the considered view that the above premise is misconceived. First, the Appellate Division is not restricted to appellate work only. The Division has and does entertain other work in its original jurisdiction. Starting from the Treaty itself, there are at least three provisions from which the Appellate Division derives

"original" jurisdiction in specific areas of its work – namely:
- preliminary rulings of national courts (i.e. "case stated"): under Article 34;
- advisory opinions: Article 36; and
- arbitration jurisdiction : Article 32 and the Court's Arbitration Rules of 2012.

11. The above provisions make it self-evident that the Appellate Division has authority to entertain matters of original jurisdiction as well as matters of appellate jurisdiction – all derived from specific provisions of the Treaty.
12. Secondly, Article 35 of the Treaty which provides for various aspects touching on the content and nature of the Court's judgments, is expressed in general terms. It speaks of judgments of "the Court", without distinction as to:
    - whether the judgments are of the First Instance Division or of the Appellate Division ; nor
    - whether the expression "the Court" signifies any particular Division of this Court.
13. It is clear and incontestable that from its context, intention and spirit, Article 35 applies to the judgments of the First Instance Division just as it does to judgments of the Appellate Division. The Respondent's further contention that the fact that Rule 72 of the Court's Rules (on judgment review) is placed under Part B and not part C of the Rules applies only to the First Instance Division, is equally misconceived. The Rules must be read as a whole, irrespective of the textual location of the particular position or place of the individual provisions therein. In any case, the Rules are subservient to the Treaty. Rule 72 must be read to accord with Article 35 (3) of the Treaty, to avoid a clash or inconsistency between the Rules and the Treaty. Any lapses or shortcomings of shoddy drafting, must be construed with a presumption in favour of making the Rules effective and workable; not inept and inoperative – see *Murray v IRC, (1918) AC 541 at 553; and Fawwcett Properties v Buckingham County Council (1960) 3 All E.R. 503 at 516)*.
14. Mr. Ngugi would have us hold that the expression "the Court", in Article 35 of the Treaty, is restricted only to the First Instance Division. Any such construction would be too restrictive; unnecessarily restrictive; indeed, unnaturally restrictive, and totally at variance with the plain, ordinary meaning of the expresson "the Court" that is expressly set forth in the definition of that term in Article 1 of the Treaty – namely: "'Court' means the East African Court of Justice established by Article 9 of this Treaty";
15. That same holistic undivided sense of the expression "the Court" is replicated in Article 9(1) (e), Article 24 and Article 27. Indeed, the matter is put beyond any shadow of doubt by Article 23, whose sub- Article (2) states that:
    "The Court shall consist of a First Instance Division and an Appellate Division."
    In other words, the one Court is comprised of two constituent units; two integral Divisions.
16. With due respect to the learned counsel for the Attorney General, Article 35A of the Treaty does not address itself to issues of jurisdiction. Jurisdiction of the Court is substantive manner elsewhere in the Treaty – in particular, in Article 23 (*role of the Court*); Article 27 (*jurisdiction of the Court*), Article 28 (*references by Partner States*); Article 29 (*references by Secretary General*); Article 30 (*references by natural and legal persons*), Article 31 (*employee disputes*); Article 32 (*arbitration*); Article 34 (*case*

*stated*); and Article 36 (*advisory opinions*).

17. Article 35 A, unlike all the other Articles, merely establishes the right of appeal for those aggrieved or otherwise dissatisfied by the judgments of the First Instance Division. In this regard, it is to be remembered that Article 35A is a creature of the 2007 Amendment of the Treaty – an Amendment which for the first time introduced the two-Chamber Court, without disturbing the substantive corpus of the jurisdiction of the Court. To that extent, it is indeed a misnomer and misconception to talk of the "jurisdiction of the Appellate Division". The First Instance Division and the Appellate Division; being integral parts of the same Court, do enjoy and exercise the same jurisdiction *mutatis mutandis*.
18. The Appellate Division would not be able to entertain appeals from judgments of the First Instance Division, if it did not in the first place enjoy the same jurisdiction of that First Instance Division. The only real distinction in this regard is that the First Instance Division exercises original jurisdiction, while the Appellate Division exercises appellate jurisdiction in the same matters. In Kenya, the equivalent of this same juridical structure is made explicit by statute – namely section 3(2) of the Appellate Jurisdiction Act, which provides that:
"…the Court of Appeal shall have, in addition to any other power, authority and jurisdiction vested in the High Court."
19. As will be readily evident from all the above, the Appellate Division of this Court, just like the First Instance Division enjoys, in appropriate cases, the same authority and power to review its own judgments – namely if the application for review is in accord with the parameters etched in Article 35 (3) of the Treaty.
20. The above exposition is sufficient to dispose of Mr. Ngugi's objection to the jurisdiction of this Appellate Division of the East African Court of Justice to review its decisions and judgments. Nonetheless, for the sake of completeness [of our jurisprudence], we will briefly examine from a comparative standpoint, the state of the law in this Region and beyond concerning the power of the Courts to review their decisions.
21. In the East African region, the case law position was ably stated by the East African Court of Appeal (EACA), especially in the cases of *Lakamshi Brothers v. Raja & Sons [1966] EA 313* and *Somani v Shirinkhanu (No. 2) [1971] EA 79*.
22. In Lakamshi, Sir Charles Newbold, P. categorically stated that judgments of the EACA were the end of litigation subject only to the limited application of the "slip rule". The Court observed that:
" This Court is now the final Court of Appeal and when this Court delivers its judgment, that judgment is, so far as the particular proceedings are concerned, the end of the litigation. It determines in respect of the parties to the particular proceedings their final legal position, subject, as I have said to the limited application of the slip rule"
23. In the *Somani case*, the Court (both Spry, Ag. P., and Law Ag. VP) recognized that:
    (a) the finality of its decisions was paramount, subject only to one exception - (see (b) below;
    (b) the Court had limited inherent jurisdiction to review its own decisions where a party is wrongly deprived of the opportunity to be heard;
    (c) failure to hear a party was not the only ground for that Court's review power. The

Court could do so in every case in which, for one reason or another, its decision is a nullity.

24. The above exposition of the law has subsequently been found to be too restrictive. Both the Supreme Court of Uganda (in the case of *Sewanyana v. Martin Aliker, Civil Application No. 4 of 1991*), and the Court of Appeal of Tanzania (in the case of *Transport Equipment Limited v. Devra P. Valambhia, 1998 TLR 89*), expressed their open sentiments for reconsideration of the holding in the Somani case. Indeed, the Ugandan Supreme Court noted that;
"Somani's judgment was given ex tempore… as the Court followed an obsolete law,it had acted *pro tonto* without jurisdiction. …[Therefore] certainly the issues between the parties could not have been fairly and properly tried between them".
25. The position for setting aside or modifying a Court's judgments would appear to be no different in both Zimbabwe and South Africa even though both those countries apply Roman-Dutch law – see helpful comments to that effect by the Court of Appeal of Tanzania in the *Transport Equipment case (supra)* which quotes the leading textbook by Herbstein & Van Wanes: *The Civil Practice of the Superior Courts in South Africa, 3rd Edition*:
"A final judgment being res judicata is not easily set aside, but the Court will do so on various grounds such as fraud, discovery of new documents, error and irregularities in procedure."
26. The Kenya experience has been a mixed bag of jurisprudence, with a series of conflicting holdings by the then highest Court in the land: the Court of Appeal. In 1996 in the case of *Rafiki Enterprises Ltd v Kingsway & Automart Ltd, Civil Application No. Nai.375 of 1996*, the Court held that it had no jurisdiction to review its own decisions. In 2005, in the case of *Musiara Ltd v Ntimana [2005] EA 317,* the Court found jurisdiction to reopen an appeal particularly if judicial bias in the impugned/proceedings is established. Similarly, and again in 2005 in the case of *Chris Mahinda v Kenya Power & Lighting Co. Ltd, Civil Application No. Nai. 174 of 2005 (unreported)*, the Court of Appeal reiterated its position that it had residual jurisdiction to review, vary or rescind its decisions in exceptional circumstances, as held in the *Musiara's case(supra)*. However, in 2007 in the case of *Jasbir Singh Rai v Tarlochan Singh Rai, Civil Application No. Nai. CA 307 of 2003 (154/2003)* , the Court of Appeal by unanimous decision denied review jurisdiction – in effect overruling the Court's earlier holdings in the two cases of 2005; and, thereby, reinstating the law of the *Rafiki case* (i.e denial of review of jurisdiction).
27. In Rwanda, the recent Law (No. 21/2012 of 14th June 2012) relating to the civil, commercial, labour and administrative procedure of the country, puts the point beyond dispute. An application for review of a Court's own decision can be made, but only with respect to judgments of the final court of resort, on the grounds of:
    (i) fraud
    (ii) false evidence, testimony or oath
    (iii) a criminal judgment which was subsequently quashed
    (iv) absence of permission to approve or confirm a party's participation in the proceedings/procedure;
    (v) error(s) of procedure or of law

28. In Australia, the case of *Autodesk Inc v. Dyason (No. 2) [1993] HCA 6; (1993) 176 CLR 300*, is instructive in setting forth the following principles:
    i) the public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or
    ii) As this Court is a final Court of Appeal there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment.
    iii) It must be emphasized, however, that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put.
    iv) The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases.
29. In India, the case for judicial review has been upheld in numerous court cases. To take just a random sampling, we list the following judgments – all rendered by the Supreme Court of India:
    (1) *Aribam Tuleshwar Sharma v Ariban Pishak Sharma (1979) 45CC 389, 1979(11) UJ 300 SC*, which held that:
    "The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."
    (2) *Rupa Ashok Hurra v Ashok Hurra*; *Writ Petition (civil) 509 of 1997* stating that:
    "The principles in regard to the highest Court departing from its binding precedent are different from the grounds on which a final judgment between the parties, can be reconsidered. … However, when reconsideration of judgment of this Court is sought the finality attached both to the law declared as well as to the decision made in the case, is normally brought under challenge. It is, therefore, relevant to note that so much was the value attached to the precedent of the highest Court that in the London Street Tramways Company Ltd vs. The London Council [LR 1898 Appeal Cases 375], the House of Lords laid down that its decision upon a question of law was conclusive and would bind the House in subsequent cases and that an erroneous decision could be set right only by an Act of Parliament."
    Nonetheles,
    "Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not

be prejudicial to anyone. The rule of stare decisis is adhered to for consistency, but it is not inflexible in Administrative Law as in Public Law. Even the law bends before justice…

Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order, the courts culled out such power to avoid abuse of process or miscarriage of justice."

(3) *Haridas v. Smt. Usha Rani Banik, Appeal (civil) 7948 of 2004* articulates the following pertinent principles:

"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

"…there is in Article 226 of the Constitution [of India] to preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of evidence …; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merit."

30. All the above jurisprudence of India has been conveniently and comprehensively summarized in a Document sytled: "*Review Jurisdiction of Supreme Court of India: Article 137*", available electronically at: http:ssrn.com/abstract=2169967. In its Introduction, that Document makes the following pertinent statements:

- The Supreme Court of India is the highest Court of the land as established by Part V, Chapter IV of the Constitution of India. It is the highest Court of Appeal.
- The Supreme Court has original, appellate, advisory and review jurisdiction.
- Article 137 of the Constitution of India, 1950, provides that subject to provisions of any law and rules made under Article 145, the Supreme Court has the power to review any judgment pronounced or order made by it. "Review" connotes a judicial re-examination or reconsideration of the case. The basic philosophy inherent in the concept of review is acceptance of human fallibility.
- Under Article 145 (e), the Supreme Court is authorized to make rules as to the conditions subject to which the Court may review any judgment or order. Pursuant to this, Section 114 of the Code of Civil
- Procedure (CPC) has been laid down, giving a substantive right of review; and Order XLVII thereunder provides for the procedure.
- Review petition is a discretionary right of court. The grounds for review are limited.
- Ever since the adoption of the Constitution (of 1950), the law on review is the

creation of statute. But even during times when there was no statutory provision, and when no rules were framed by the highest Court, Courts had culled out such power in order to avoid abuse of process of Court or miscarriage of justice

- A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier. The power of review can be exercised only for correction of a patent error of law or fact which stares at you in the face, without any elaborate argument being needed for establishing it.

31. For the East African Court of Justice (EACJ), unlike its predecessor the East African Court of Appeal (EACA), the Treaty in its Article 35 (3) expressly provides for review of the Court's decisions and judgments. There can, therefore, be no room for argument concerning the authority or power of this Court to review its own judgments within the scope and ambit of Article 35(3) of the Treaty. The only issue now raised by the Respondent in the instant Application is whether the power of review under Article 35 (3) covers both Divisions of this Court, or whether it is available only to one Division: the First
32. Instance Division. This Court's answer – having regard to the specific Treaty provision, as well as considering all the rich international and comparative jurisprudence discussed above – is a resounding Yes: the power of review in that Article extends to both Divisions of this Court. Accordingly, there is absolutely no bar for the Appellate Division of this Court, to review its own decisions and judgments, whether such have been rendered on appeal, or pursuant to its own special original jurisdiction (such as in advisory opinions, case stated, arbitration, etc).
33. Mr. Ngugi's contention that a power to review is not available to a court (such as the Appellate Division of this Court whose judgments are final (i.e not open to any further appeal), is untenable. That point was put to rest, for regional courts, in the two cases of *PTA Bank v Martin Ogang, Reference Revision No. 1/2001, and Dr. Kabeta Muleya v COMESA & Erastus Mwencha, Revision Application No. 1/2002*, in which the COMESA Court of Justice readily found jurisdiction in Article 31(3) of the COMESA Treaty to review its previous judgments, even though at that time the COMESA Treaty did not provide for any appeals against the judgments of that Court. It is only in recent times that the COMESA Court, like the EACJ Court, has since been restructured (through express Treaty Amendment) into two integral Divisions: a First Instance Division, and an Appellate Division.
34. This is the same position in England, where the final, ultimate court of appeal (The House of Lords) has on appropriate occasions, re-opened its concluded judgments for rehearing – see *R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochete Ugarte (No. 20 [1999] 1 All E. R. 577*. In that case, Lord Browne-Wilkinson stated that:

"…the respondents to this petition do not dispute that your Lordships have jurisdiction in appropriate cases to rescind or vary an earlier order of this House. In my judgment that concession was rightly made both in principle and on authority.

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered."

35. Indeed, it stands to reason and rational logic that the final court – even more so than the subordinate courts – be clothed with authority to review their judgments. After all, a subordinate court's failure to review its judgment is readily cured and remedied by resort to an appeal to the Appellate court against that judgment. Not so with a judgment of a final court (such as the Appellate Division of this Court) – against which there can be no further appeal. Here, the only judicial recourse available against the fallibility or injustice of such a court is to advert to review of its earlier judgment. It is for this reason that the civil law system restricts this review power only to final judgments of a court from which no appeal lies (see *Rwanda's Law No. 21/2012 of 14/06/2012* discussed above). It is for the same reason that the House of Lords (the Court of last resort in the United Kingdom) took the stand it took in the *Pinochete case (supra)*; and the Court of Appeal has likewise re-opened its concluded appeals – see *Taylor & Anor. v Lawrence & Anor.[2002] 2 All E. R. 353*.

**Consideration of the Review Grounds in Instant Application**

36. Having considered the issue of whether the Appellate Division of this Court has jurisdiction to review its own decisions, the question then remains as to whether the instant application is a proper case for that Court to exercise its review jurisdiction?
37. The starting point to answer that question is Article 35(3), which is the basis for the Court's power of review – namely:
"An application for review of a judgment may be made to the Court only if it is based upon the discovery of some fact which by its nature might have a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made or on account of some mistake, fraud or error on the face of the record or because an injustice has been done".
38. To qualify for review under the above-quoted provision, an application needs to fulfil any or all the conditions specified therein. The Applicant must adduce discovery of some new set of facts/evidence which was not within the knowledge of the party and the Court at the time of the delivery of the judgment. The impugned judgment must evince some mistake, fraud or error that is manifest on the face of the record; or, alternatively, the judgment, as is, must have given rise to a miscarriage of justice.
39. The grounds for the instant application were largely limited to the area of mistakes or errors of law apparent on the face of the record; and only tangentially touched on the element of injustice. Nothing at all was raised by way of discovery of new facts; nor of fraud.
40. Of the 30 grounds listed by the Applicant a hefty number raise allegations of error apparent on the record. To deal with each one of these grounds effectively, it will be necessary to examine up front the general principles that govern this particular area of our law.
41. First and foremost, the term "error apparent on the face of the record" is not/hardly a term of art: one whose meaning has been definitively settled, once and for all. Rather, it is a nebulous legal concept the fluidity of whose content must be interrogated in

every case – using the rich jurisprudence that has grown up around it. Second, implicit in that term, is the notion that review of a judgment has a limited purpose. It must not be allowed to be an appeal in disguise. The purpose of review is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cause. On these two principles hang all the law of "apparent error". In this regard, most significant among the principles (gleaned from the rich jurisprudence that we have alluded to), are the following:

- As the expression "error apparent on the record" has not been definitively defined by statute, etc, it must be determined by the Court's sparingly and with great caution.
- The "error apparent" must be self-evident; not one that has to be detected by a process of reasoning.
- No error can be said to be an error apparent where one has to "travel beyond the record" to see the correctness of the judgment – see paragraph 2 of the *Document on "Review of Jurisdiction of the Supreme Court of India" (supra)*
- It must be an error which strikes one on mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions – see *Smti Meera Bhanja v. Smti Nirmala Kumari (Choudry) 1995 SC 455*. A clear case of "error apparent on the face of the record" is made out where, without elaborate argument, one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it – see
- *Thugabhadra Industries Ltd v. The Government of Andra Pradesh 1964 AIR 1372; 1164 SCR (5) 174*;
- also quoted in *Haridas Das v. Smt. Usha Rani Banik & Ors, Appeal (civil) 7948 of 2004*.
- In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish – see *Sarala Mudgal v. Union of India M. P. Jain, page 382, Vol.I*
- Review of a judgment will not be considered except where a glaring omission or a patent mistake or like grave error has crept into that judgment through judicial fallibility – see Document: *"Review Jurisdiction of Supreme Court of India" (supra)*.

42. This power of review has been allowed if the order sought to be reviewed is based on: a decision *per incuriam*; or an incorrect set of facts or assumption of law; or non consideration of a contention made; or if a judgment is inconsistent with the operative portion or an interim order which was granted subject to the outcome of the appeal to clarify an ambiguity.
43. A similar doctrine for review of Court judgments which is well established and widely practiced, especially by courts in the Common Law jurisdiction, is the "Slip Rule", by which all courts (of whatever hierarchy) are empowered to, correct without much ado, inadvertent mistakes of computation (arithmetical calculations), clerical errors (of spellings, proper names, addresses, etc); and others of similar genre – which invariably slip into court orders and judgments by (so to speak) the 'slip of the pen'. A good example of the judicial treatment accorded to the Slip Rule is the Tanzanian case of *Transport Equipment v Devram Valambhia (supra)*

**Specific Grounds for Review**

44. Against the general backdrop of the above Principles and Rules, we will now proceed to assess/examine individually/one by one the several grounds adduced by the Applicant in the instant Application for a review of this Court's judgment of 15th March, 2012:

(1) Facts and the Appellate Division

The Applicant averred that this Court erred in looking into the facts of the case – especially in re-opening points of facts already decided by the First Instance Division. The Appellate Division, it was urged, should have restricted its appellate jurisdiction under Article 35A on assessment of the law, procedural irregularities, and grounds for lack of jurisdiction. The general thrust of this submission was correct – particularly so in situations where there is a clear demarcation between the facts and the law of the particular case. However, where (as in the instant case) there are issues of mixed fact and law, it becomes near impossible to separate the two into two neat boxes: one, of "fact"; and the other, of "law". The issue on appeal before this Court was one of mixed fact and law. Consideration and determination of the issue of a time bar, necessarily involved computation of time and determination of the applicable law. One cannot determine the law on an issue of a time bar, without adverting to the factual time frames involved. Moreover, the central issue before the Appellate Division was whether under Article 30(2) the alleged breach was continuous or not. We held that it was not continuous. That was eminently a question of law, rather than of fact. Any fact in it was only tangential, incidental and coincidental.

In any case, in the course of their oral submissions before the Court, the Applicant stated that:

"When a court of Appeal, as this Court is constituted, is limited to points of law, it cannot re-open the evidence. It cannot reweigh the evidence. What it can do is to look at the findings or facts by the lower court and determine whether the Court in making those findings correctly addressed itself to the issues and facts that were before it."

It is evident from Ms.Kilonzo's above submission that she conceded some role for this Appellate Court to "look at the lower court's findings of fact to determine whether that Court correctly addressed itself". How then can the same counsel for the Applicant now turn around and claim that the Division had no jurisdiction to entertain anything touching on facts? No; the Applicant cannot be heard to speak from both sides of her mouth.

Be all that as it may, the Applicant's contention here amounts to more than an "error apparent on the record". It delves into the merits of the case, calling for elaborate investigation and argumentation of the issues. That calls for an appeal; not a review of the judgment.

(2) Non-consideration of the Police Report

The Applicant contended that this Court, in determining the question of time bar, failed to consider the Police Report published in 2010 (i.e after the filing of the instant Reference in this Court). The failure, it is claimed, resulted in an injustice to the Applicant and to the people of the Mt. Elgon community, in as

much as there was no fair hearing. While this ground accords with the third limb of Article 35 (3) of the Treaty (i.e. "injustice"), it falls short of the standard (required) under this Article. First, determination of the issue at hand (i.e time bar) did not necessitate exhaustion of all conceivable reports issued in the matter of the Mt. Elgon atrocities. In this regard, this Court did consider no less than five such reports that were exhibited in court (all listed and examined at page 18 of the Court's judgment of 15th March 2012).

Secondly, the Applicant's assertion is factually wrong. The truth of the matter is that the Court did indeed examine the matter of the Police Report. From its typed record, this Court did engage counsel Kilonzo in a spirited question-and-answer session – from which the following factors emerged:

- that the Police Report was a purely internal probe, carried out by a couple of Police Officers for the internal use of the Police Department;
- that the Report did not involve public sittings, investigations, etc;
- that the Report was not published to the public;
- that even the Attorney General of the Republic of Kenya was not aware of the Police Report; and came to know of its existence only when the Report was belatedly availed at this Court.

45. From all the above, it is self-evident that –
    (i) the Court was conversant with and did consider the matter of the Police Report;
    (ii) the Report did not amount to much in terms of its evidential value and efficacy;
    (iii) far from cause injustice to anyone; the Court afforded all the parties inclusive of the amicus curiae, appropriate due process – both procedurally and substantively.
46. But here, again, even if the Appellant's grievances were well-founded, the appropriate recourse to remedy them would not be a review of the impugned judgment. Rather, it would be a substantive appeal against that judgment – because the matters now raised go well beyond the face of the record. They entail a substantive challenge of the merits of the Court's decision. On this, the law is clear: what may be a good ground, even an excellent ground, for appeal, need not be a valid ground for review – see *AIR Commentaries on The Code of Civil Procedure by Chitaly & Rao 4th Edition Vol.3, p.3227*. See also the COMESA Court's holding in the case of *Dr. Kabeta Muleya v COMESA (supra)*.

    Thirdly, in the course of her oral submissions before this Court, Ms. Kilonzo when queried by the Court in that behalf readily conceded that:
    (i) the impugned judgment of this Court is "correct"; and
    (ii) nothing much turns on the Police Report – a fact which is duly borne out by the record of the appeal proceedings of this Division, in which counsel gave no value at all to the fact of the Police Report. We are satisfied that counsel's vigorous canvassing of this particular issue that this stage of the proceedings is but an afterthought.
    (iii) Non-consideration of Applicant's submissions The Applicant's contention to the effect that this Court failed to consider the Applicant's written and oral submissions "individually and in totality", is simply mischievous. The Court's entire judgment of 15th March, 2012 is testimony to the express, detailed, comprehensive analysis, assessment, balancing and dissection of all the issues

raised and submissions made by all the parties and the amicus curiae in this matter.

(iv) Other Grounds the rest of the grounds are far too numerous to examine one by one. Nonetheless, individually and collectively they all evince one defining characteristic: dissatisfaction and aggrievement by the Applicant at the Court's particular findings, views, opinions, conclusions, interpretations, constructions, applications and decisions on the numerous points now raised as grounds of the prayer for review. They all seek to overturn the Court's "erroneous" views on these points, and to transform them instead into the "correct" views desired by the Applicant. Unfortunately for the Applicant, that cannot be. The Court cannot under the subterfuge of a "review", engage suffice.

47. The long laundry list of the Applicant's grounds was not far removed from a fishing expedition of sorts. Worse still, items on the list were manifestly repetitive in a great many aspects of its claims and contentions. Thus, right from the start the confusion arises between whether the Applicant is seeking a review or an appeal. It is quite clear that the Applicant took great exception to a great number of the Court's findings, views and holdings contained in the impugn
    - The review jurisdiction of the Court cannot be exercised on the ground that the decision of the Court was erroneous on merit. That would be in the province of a Court of Appeal.
    - A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier.
    - A review proceeding cannot be equated with the original hearing of the case.
    - The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re-argue their cases.
    - The parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the Court of the legal result. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted – see *Hoystead v Commissioner of Taxation [LR1926 AC155 at 165]*.
    - A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of error committed subordinate court. In the instant case, there are of course no further appeals allowed from the decisions and judgments of this Appellate Division.
48. With regard to the Applicant's numerous challenges of this Court's analysis, reasoning and basis by which the Court arrived at its findings, opinions and decision, the law provides that if a view held by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view (such as the ones now canvassed by the Applicant) was also possible – See the Kenyan Court of Appeal case: *Nyamongo & Nyamongo Advocates V Moses Kipkplim Kogo, Civil Appeal No. 322 of 2000 (unreported)*.

**Conclusion**

(1) The Appellate Division of this Court has express jurisdiction under Article 35 (3) and Rule 72 of the Court Rules to review its own decisions in appropriate cases.

(2) All in all, the grounds adduced by the Applicant for this Court to review its judgment of 15th March 2012 in the matter of Mt. Elgon atrocities of 2006 – 20 may well be good grounds for a further appeal (which is not provided for in the EAC Treaty) They are not under our law valid for a review of that judgment.

The Application for review is hereby denied

Each party shall bear its own costs of this Application.

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East African Court of Justice – First Instance Division
Application No 5 of 2012

Arising from Reference No.1 of 2012

**Timothy Alvin Kahoho And the Secretary General of the East African Community**

Johnston Busingye PJ, Mary Stella Arach-Amoko DPJ; Isaac Lenaola J
July 19, 2012

*Interim injunction - Irreparable injury must be proved by evidence- Whether an injuction should be granted to prevent the implementation of the directives of EAC Heads of States.*

*Articles: 38(2) and 39 of the Treaty for the Establishment of the East African Community - Rules 21, 41 and 73 of the East African Court of Justice Rules of Procedure, 2010 –*

The Applicant filed Reference No. 1 of 2012 praying for orders that the Summit directives set out in paragraphs 6 and 10 of the communiqué issued at the 13th Ordinary Meeting in Bujumbura, Burundi be declared null and void as they were issued in breach of Articles 6,7 and 123(6); 73 and 138 of the Treaty. Pending determination of the Reference, the Applicant this application seeking for interim orders to restrain the Respondent, his agents and servants from executing the said activities, namely: the approval of the Protocol on Privileges and Immunities; producing a road map for the functioning of the Customs Union, Common Market and Monetary Union and; proposing an action plan on a draft model structure of the East African Political Federation.
The Applicant claimed that if Respondent, his agents and servants carried out the disputed functions before the disposal of Reference No 1 of 2012, the relief he sought therein would be rendered nugatory.
The Respondent asserted that there was no breach of the Treaty.

**Held:** Injury, whether reparable or irreparable cannot be presumed. It is a question of evidence and must be proved. The Applicant merely pleaded that the Reference will be rendered nugatory if this application is refused. The Applicant did not show that if the directives are implemented this would result in irreparably injury to him or to anybody else. And since the application did not meet the conditions for the grant of an interim order, it was dismissed.

**Cases cited:**
American Cynamid v Ethicon [1975] ALL ER 504 AT 505
East African Law Society and 4 others v The Attorney General of the Republic of Kenya and 3 Others, EACJ Application No. 9 of 2007
Giella v Cassman Brown & Co. Ltd (1973) E.A 358
Kenya Commercial Finance Co. Ltd. v Afraha Education Society [2001] E.A 86

Mary Ariviza and Okotch Mondoh v The Attorney General of The Republic of Kenya and The Secretary General Of the EAC, EACJ Application No. 3 of 2010
Professor Peter Anyang' Nyongo and 10 others v The Attorney General of the Republic of Kenya and 5 Others, EACJ Ref. No. 1 of 2006
The East African Law Society and 3 Others v the Attorney General of Kenya and 3 Others, EACJ Reference No. 3 of 2007

**Ruling**

1. This is an application brought by Notice of Motion under Articles 38(2) and 39 of the Treaty for the Establishment of the East African Community (the "Treaty" ), and Rules 21, 41 and 73 of the East African Court of Justice Rules of Procedure, 2010. The Applicant is Timothy Alvin Kahoho, a citizen of Tanzania resident in Dar es Salam. The Respondent is the Secretary General of the East African Community (the "EAC"). He is sued in his capacity as the Principal Executive Officer of the EAC.
2. The Applicant filed Reference No. 1 of 2012 praying for orders that the Summit directives set out in paragraphs 6 and 10 of the communiqué issued at the 13th Ordinary Meeting in Bujumbura, Burundi be declared null and void as they were issued in breach of Articles 6,7 and 123(6); 73 and 138 of the Treaty.
3. Pending determination of the Reference, however, the Applicant has filed the instant application seeking for an interim order to restrain the Respondent, his agents and servants from executing the said activities, namely:
   i) the purported approval of the Protocol on Privileges and Immunities for East African Community, its Organs and Institutions for conclusion ;
   ii) Producing a road map for establishing and strengthening institutions identified by the Team of Experts as critical for the functioning of the Customs Union, Common Market and Monetary Union;
   iii) Formulating an action plan for the purpose of operationalising the other recommendations in the report of the Team of Experts;
   iv) Proposing an action plan on and a draft model structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting.
4. The Applicant also prays for the costs of the application and any other relief(s) this honourable Court may deem fit to grant.
5. The grounds for the application are set out in the affidavit in support of the application sworn on the 16th May 2012 by the Applicant wherein he states that he was prompted to file this application following a report of the 24th Extraordinary Meeting of the Council of Ministers Ref. EAC/EX/CM24/2012, convened by the Respondent in Arusha between 20th to 26th April 2012, which he came across on the internet recently, where the Respondent has already re-allocated USD 109, 020.00 for undertaking the project of formulation of the Model Work Plan towards the EAC Political Federation.
6. This was after he had on the 20th January 2012, lodged Reference No. 1 of 2012 in this Court.
7. He contends that by calling that meeting, the Respondent violated Article 38 (2) of the Treaty which provides that where a dispute has been referred to the Court,

the Partner Stares shall refrain from any action which might be detrimental to or aggravate it. He argues therefore that unless restrained by an interim order, the Respondent, his agents and servants will carry out the disputed functions before the disposal of the Reference, thereby rendering the relief sought therein nugatory.

8. The Respondent opposes the application for the reasons set out in the affidavit in reply sworn on his behalf by Mr. Jean Claude Nsengiymunva, the EAC Deputy Secretary General (Finance and Administration), on the 9th July 2012 wherein he asserts very strongly that the Respondent has not breached the Treaty at all as alleged by the Applicant in that :
   i) The Summit decision regarding approval of a Protocol on Immunities and Privileges of the EAC Organs and Institutions is consistent with Article 11(1) and does not breach Articles 73 and 138 of the Treaty but implements them when read together with Article 151 of the Treaty to create a common platform to guide the issue of immunities and privileges in all agreements signed by the Secretary General with the governments of the Partner States;
   ii) The Summit directive to the Secretariat to produce a road map for establishing and strengthening the Institutions identified by the Team of Experts as critical for the Customs Union, the Common Market and Monetary Union is consistent with the functions of the Secretariat as set out in articles 71(b), (c), (d) and (l) of the Treaty;
   iii) The Summit directive to the Secretariat to formulate an action plan to operationalise the recommendations in the Report of Experts is consistent with the functions of the Secretariat under Articles 71(b) and (d) of the Treaty;
   iv) The Summit directive to the Secretariat to propose a model structure for the EAC Political Federation for consideration by the Summit at its 14th Ordinary Meeting is consistent with the functions of the Secretariat under Articles 71(b), (c), (d) and (l) of the Treaty.
   v) The Summit did not contravene Articles 6, 7, and 123(6) of the Treaty in that under Article 123(6) of the Treaty, the process of Political Federation was actually initiated by the Council when it appointed a Team Of Experts whose recommendations the Secretariat is now improving on.
   vi) The actions of the Respondent are consistent with its mandate and are not detrimental to the resolution of the dispute.
9. He submitted that the USD 109, 020.00 had in fact already been allocated and utilized, pursuant to Council Directive Ref. EAC/CM24/Decision 21, towards formulating a Model Work Plan for the EAC Political Federation and the issue had been overtaken by events.
10. He argued that the Reference is, for the foregoing reasons, therefore misconceived and it should be dismissed with costs to the Respondent.
11. For the purposes of this application, it is necessary, in our view, to reproduce right from the outset, the contents of the impugned paragraphs 6 and 10 of the communiqué that has caused grievance to the Applicant. It stated that:
    "6. The Summit approved the Protocol on Immunities and Privileges For the East African Community, its Organs and institutions for conclusion.

10. The Summit considered and adopted the Report of the team of Experts on Fears, Concerns and Challenges on the Political Federation. The Summit noted that the Team of Experts had studied and made recommendations for addressing the Fears, Concerns and Challenges. The Summit mandated the Secretariat to:
    I. Produce a road map for establishing and strengthening the Institutions identified by the Team of Experts as critical to the functioning of a Customs Union, Common Market and Monetary Union.
    II. Formulate an action plan for purposes of operationalising the other recommendations in the Report of the Team of Experts; and
    III. Propose an action plan on and a draft model of the structure of the East African Political Federation for consideration by the Summit at its 14th Ordinary Meeting".
12. The Applicant appeared in person, while Mr. Anthony L. Kafumbe, a Legal Officer at the EAC Secretariat, appeared for the Respondent.
13. Both parties adopted the written submissions they had filed in Court where they basically repeated the averments in their respective pleadings and the affidavits on record. They then made brief supplementary oral submissions.
14. In addition to his written submissions, the Applicant emphasized that the Respondent has continued to implement the activities he is disputing even after he had lodged his documents in Court. That is why he is requesting this Court to issue the order so that the Respondent is prevented from calling the Council of Ministers to be handed recommendations and the Model Structure of the Political Federation for consideration by the Summit at its 14th Ordinary Meeting. Article 38(2) of the Treaty is, according to the Applicant, mandatory and clear. It does not require a party to first obtain a temporary injunction as alleged by the Respondent's Counsel. In support of this proposition, he relied on the decision of this Court in *The E.A Law Society and 3 Others vs The A.G of Kenya and 3 Others, Reference No. 3 of 2007*.
15. On his part, Mr. Kafumbe vehemently opposed the application on the ground that it did not meet the conditions for the grant of the order sought as set out in the celebrated case of *Giella v Cassman Brown Ltd* which this Court adopted in *The East African Law Society vs The Attorney General of Kenya (supra)* which are that: the Applicant must show a prima facie case with a probability of success; secondly, an injunction will not be granted unless the Applicant might otherwise suffer an irreparable injury that cannot be compensated by an award of damages ; and lastly, when court is in doubt, it will decide the application on the balance of convenience.
16. He submitted that the Applicant had not established that he has a *prima facie* case with a probability of success. He is challenging functions that the Treaty confers on the Summit and the Secretariat. The Respondent has, however, shown that the Team of Experts with which the Applicant is very uncomfortable was not appointed by the Respondent but by the Council.
17. On the second condition, Mr. Kafumbe argued that the position of the Respondent is that this is a case which can be compensated by way of damages which the Applicant has already asked for. He will not therefore suffer irreparable injury if the injunction is refused.
18. Lastly, on the balance of convenience, Mr. Kafumbe submitted that the USD 109,

020.00 has not only been allocated but has been utilized by the Secretariat which has already formulated an action plan and drafted a proposed Model Structure of the Political Federation ready for consideration by the Summit. That since the activities complained of by the Applicant have been implemented, the balance of convenience favours the Respondent.

He asked the Court to dismiss the application with costs, for these reasons.

19. The Applicant insisted, in his brief response, on his prayers. He emphasized that he had also filed the Reference because he is aggrieved by the said directives in his capacity as a concerned citizen of East Africa who cannot sit by and look on as the Treaty is being violated and the tax payers' money is being squandered for implementation of an illegal directive.
20. He contended that the central issue in his application is whether the 13th Summit of the Heads of States breached Articles 6, 7, 73, 123 (6) and 138 of the Treaty in issuing the impugned directives directly to the Secretariat. The Respondent should not therefore be allowed to proceed with those activities in preparation for the next Summit before this Court determines the issue.
21. He disagreed with the Respondent's assertion that the application was overtaken by events and argued that the Respondent's Counsel had stated in his submission that the Secretariat is duly executing its mandate under the Treaty and the outcome of the exercise will in the fullness of time be brought to the attention of the Council and the Partner States.
22. According to the Applicant, the process is still ongoing because everything will be handed to the Council for submission to the next Summit of Heads of State, therefore, the Respondent will be asking for allocation of more funds to undertake the process. He maintained the prayer that if this court does not grant the interim order requested for, the reference would become irrelevant since the impugned activities would have been discharged.
23. The clear purpose of the application is for the grant of an interim injunction to prevent the implementation of directives contained in Paragraphs 6 and 10 of the communiqué issued by the Summit at the close of the 13th EAC Heads of States Meeting held in Bujumbura, Burundi on the 12th November 2011, until this Court determines whether they infringe the articles of the Treaty specified in the Reference. Undoubtedly this court has the power to issue the order sought, pending determination of the Reference filed in the court.
24. The grant or refusal to grant a temporary injunction is an exercise of the Court's judicial discretion which must be exercised judiciously. The purpose of a temporary injunction is to maintain the status quo. The conditions for the grant of a temporary injunction are well settled in our jurisdiction although they have been stated in various terms over the years. We state them below:
    a) For a temporary injunction to issue, the applicant must show to the satisfaction of the court that he has a prima facie case with a probability of success.
    b) 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.
    c) If the Court is in doubt, it will decide the case on the balance of convenience.

(see: *Giella v Cassman Brown & Co. Ltd (1973) E.A 358* followed by this court in a number of cases including *Professor Peter Anyang' Nyongo And 10 Others v The Attorney General Of The Republic of Kenya and 5 Others, Ref. No. 1 of 2006; East African Law Society and 4 Others v The Attorney General of the Republic of Kenya and 3 Others, Application No. 9 of 2007*; and more recently, in Mary Arividza and *Okotch Mondoh v The Attorney General of The Republic of Kenya and The Secretary General Of the EAC, Application No. 3 of 2010.)*

25. The conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third one can be addressed.(See: *Kenya Commercial Finance Co. Ltd. V Afraha Education Society [2001] E.A 86 at p. 87.*)
26. It is no function of this court at this stage, of course, to delve into the merits of the Reference or to determine difficult questions of law which will be determined after a full hearing of the Reference and detailed arguments based on the facts and applicable law.
27. The sole issue before us for determination is thus, whether, in the circumstances, an interim restraining order should be issued.
28. We have carefully perused the pleadings of both parties in the Reference and in the Motion. We have also considered the very able submissions by the Applicant as well as the one of Counsel Kafumbe together with the authorities cited and the law applicable to the matter before us.
29. With regard to the first condition, the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there are serious questions to be tried. (See: *American Cynamid v Ethicon [ 1975] ALL ER 504 AT 505*).
30. From the material before us, we note that the Applicant has raised in his pleadings and submissions the contention that the probability of success of his Reference lies in the fact that nowhere in the Treaty is it indicated that the Summit can mandate any of its functions directly to the Secretariat. He asserts that, under the Treaty, the Summit must always pass through the Council or the Secretary General and not directly to the Secretariat. His contention is that the directive by the Summit to the Secretariat is thus a breach of the various articles, including 6, 7, 73, 123(6) and 138 and of the Treaty.
31. On his part, the Respondent contends that there is no breach of the Treaty by the Summit because the Treaty confers on the Summit and the Secretariat the functions the Applicant is challenging. By issuing the impugned directives, the Summit thus acted within its mandate under the Treaty, particularly Article 11(1) read together with Article 151; 71(b), (c), (d) and (l) as well as Article 123(6).
32. From the foregoing, it is apparent that the Applicant is challenging the process not the substance of the Summit directives in question. Resolution of this dispute will necessarily involve the interpretation of those specified Articles of the Treaty and the court will have to address itself, *inter alia*, to the following issues:
    i) Whether the Summit directives contained in paragraphs 6 and 10 of the Communiqué issued by the Summit at its 13th Ordinary Meeting held at Bujumbura breached Articles 6, 7, 73, 138, and 123(6) of the Treaty as alleged by the Applicant;

ii) If so, what effect, if any, would it have on the implementation thereof by the Secretariat?

33. These issues are in our view, neither frivolous nor vexatious. They require interpretation by the Court of the Articles of the Treaty mentioned. Consequently, we have no doubt that the applicant has crossed the first hurdle.
34. As to whether the Applicant and East Africans will suffer irreparable injury if the injunction is not granted, with due respect to him, we do not find this from the affidavit on record. Injury, whether reparable or irreparable cannot be presumed. It is a question of evidence and must be proved. In the instant application, the Applicant merely pleaded that the Reference will be rendered nugatory or, useless, to use his own words, if this application is refused, because the Respondent will go ahead and implement the impugned directives, to the detriment not only of himself but of East Africans as well . However, he did not show us that if the directives are implemented, it will necessarily result in irreparably injury to him or to anybody else. As for injury to East Africans we can only remind the Applicant that he filed this Reference in his personal capacity, not in a representative capacity and he can only speak for himself.
35. His assertion that the injury he fears is that some Head of State might dream up something one night, wake up the following morning and implement it, was, with due respect, a hypothetical statement, made from the bar and was unsupported by the evidence on record. We also failed to find any direct relationship to the facts of the instant application. It amounts in our view, to nothing more than fear mongering.
That being so, we find that the Applicant has failed to meet the second condition for the grant of the order sought.
36. Balance of convenience means the prejudice to the Applicant if the injunction is refused weighed against the prejudice to the Respondent if the order is granted. A close examination of the pleadings and the evidence before us shows that the Secretariat has gone a long way in the process of implementing the impugned decision and directive. This simply means that the status quo intended to be maintained by the application is no longer in place. Above all, when the totality of the circumstances of the case are examined, we find that stopping the process at this stage would in our view occasion more injury to the citizens of East Africa whom the Applicant purports to be fighting for since a substantial sum of tax payers money has already been spent on the process. As we stated earlier, the Applicant seems to be challenging the procedure not the substance of the directives in question. We are accordingly of the considered view that the balance of convenience favours the Respondent.
37. As for the provisions of Article 38 (2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of an injunction is a function of the Court in exercise of its discretionary power. Therefore Article 38(2) cannot be seen to be removing that long held position without expressly saying so. Further, in the authority the Applicant referred to us, that is, *The East African Law Society and 3 Others and the Attorney General Of Kenya and 3 Others; Reference No. 3 of 2007*, the Applicant did not show us, neither were we able to find where the Court held that Article 38(2) acts as an automatic injunction once a dispute has been referred to the Court or to the Council.
38. In the result, and for the reasons given herein, we find that the application does not

meet the conditions for the grant of an interim order. It is accordingly dismissed. The costs of the application shall abide the outcome of the Reference.

39. However, in order to examine the fears expressed by the Applicant, the Registrar is requested to ensure that the hearing of the Reference is fast tracked.

It is so ordered.

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East African Court of Justice – First Instance Division
Application No. 7 of 2012

Arising out of Reference No. 3 of 2011

**Attorney General of the Republic of Uganda And East African Law Society, Attorney General of the Republic of Kenya, Secretary General of the East African Community (Interested Parties)**

Johnston Busingye PJ, Jean Bosco Butasi J and Isaac Lenaola, J
February 14, 2013

*Injury can be compensated by damages - Stay of proceedings may be granted where there are multiple proceedings pending in both divisions of the Court.*

*Rule 1(2) and Rule 21(1) of the East African Court of Justice Rules of Procedure, 2010.*

The Applicant was the Respondent in Reference No. 3 of 2011 was brought by the Respondent East Africa Law Society claiming that the Treaty had been infringed when Kenyan and Ugandan security forces arrested, detained and charged several suspects following the attacks that occurred on 11th July 2010 in Kampala.

The Applicant was also a Respondent in a similar case Reference No 4 of 2011 brought by Omar Awadh and 6 Others who were allegedly arrested and abducted from Kenya to Uganda and charged in connection with the 11th July 2010 terrorist bombings in Kampala. They alleged that this was in violation of the Treaty establishing the East African Community. Application No. 4 of 2011 arose from this Reference and in it the Applicant /Attorney General of Uganda claimed that Reference No. 4 of 2011 was barred by limitation of time. The First Instance Division ruled that it was not time barred and Aggrieved by the Ruling, the Applicant lodged Appeal No 2 of 2012, which was still pending before the Appellate Division.

Pending the outcome of Appeal No. 2 of 2012, the Applicant sought a stay of proceedings of Reference No. 3 of 2011.

**Held:** A stay may be granted where there are multiple proceedings pending in both Divisions of the Court as the decision of the Appellate Division might affect the outcome of the other proceedings. The aim is to avoid conflicting decisions and the possibility of rendering some of the decisions nugatory. The interest of justice would therefore be better served by granting a stay.

**Cases cited:**
Mobil Producing Nigeria unlimited v. His Royal Highness Oba Yinusa A. A, Court of Appeal of Lagos, Nigeria CA/l/255/05
The Independent Medical Legal Unit v Attorney General Kenya, EACJ, Reference No. 3 of 2010

**Ruling**

**Background**

1. This is an Application brought on 5th December 2012 by Notice of Motion under Rule 1(2) and Rule 21(1) of the East African Court of Justice Rules of Procedure (hereinafter, "The Rules") by the Attorney General of the Republic of Uganda.
   The Applicant who is also the Respondent in Reference No. 3 of 2011 from which this Application arose, was represented by Mr.Wanyama Kodoli, Principal State Attorney and Ms Nabaasa Charity, State Attorney.
2. The Respondent is the East Africa Law Society, the Premier Regional Lawyers' Association in East Africa and was represented by Prof. Fredrick Ssempebwa.
3. The 1st Interested Party was represented by Mr. Muiruri Ngugi, State Counsel.
4. The 2nd Interested Party was represented by Mr. Steven Agaba, Principal Legal Officer.
5. The Applicant seeks that this Court stays proceedings in Reference No. 3 of 2011 pending the determination of Appeal No. 2 of 2012, which is pending before the Appellate Division of this Court.
   For the sake of clarity, we need to recall, in a succinct way, the nexus between Reference No. 3 of 2011 and Appeal No. 2 of 2012.
6. Reference No. 3 of 2011 was brought before this Court by the East Africa Law Society, the Respondent, in this Application, on 31st May 2011. The Applicant stated in the said Reference that; "On or about the 11th July 2010, a group of terrorists claiming to be members of the Al Shabab militants (sic) perpetrated and carried out terrorist bomb attacks at the Kyadondo Rugby Club and the Ethiopian Restaurant (Kabalagala) in Kampala, Uganda, that claimed the lives of over 82 people. Following the attacks, the security forces arrested, detained and charged a number of suspects…..".
7. Some of the suspects were from Kenya and in the Reference, the Applicant alleged that the arrest, detention and the prosecution of some, or all Kenyan suspects was unlawful, and contravened the laws of the Republic of Uganda and Articles 5(3) (f), 6(d), 7(2), 27, 29, 30, 38 and 71 of the Treaty for the Establishment of the East African Community (hereinafter, "the Treaty").
8. The Respondent, the Applicant in this case, denied any violation of Uganda laws or infringement of the Treaty but, as a preliminary issue, argued that under Article 30(2) of the Treaty, the Reference was time barred and prayed that Reference No. 3 of 2011 be stayed pending determination of Appeal No. 2 of 2012.
   Appeal No. 2 of 2012 is an appeal from this Court's ruling in Application No. 4 of 2011which arose from Reference No. 4 of 2011 lodged in this Court on 9th June 2011.
9. *Reference No 4 of 2011was brought by one, Omar Awadh and 6 Others* against The Attorneys General of Uganda and Kenya as well as the Secretary General of the East African Community. The complaint therein, in brief, is that a number of Kenyan nationals were allegedly arrested and abducted from Kenya to Uganda in connection with the 11th July 2010 terrorist bombings in Kampala, and that their alleged capture and abduction from various locations in Kenya by officers from Kenya, Uganda and the United States of America's Federal Bureau of Investigation, and spiriting them across the border to Uganda where they are facing charges of murder, terrorism and

suicide attacks that occurred in Kampala, without invoking due legal process in the respective countries, violated the Treaty, the African Charter on Peoples and Human Rights, the United Nations Charter, and the Universal Declaration of Human Rights.

10. In Application No. 4 of 2011, the Attorney General of Uganda claimed that Reference No. 4 of 2011 was barred by limitation of time and this Court upon hearing parties to it ruled that it was not time barred. The Attorney General of Uganda, not being satisfied by our Ruling filed Appeal No 2 of 2012, which is pending before the Appellate Division of this Court, praying that it be set aside and that the Reference be declared time barred and consequently struck off.
11. The nexus between the two References is that they both challenge the legality of the alleged arrest, abduction, detention and prosecution, in Uganda, of Kenyan nationals in connection with the 11th July 2010 bombing in Kampala, Uganda. The other connection is that the Attorney General of Uganda claims that both are time barred.

**Grounds of the Application**

12. The instant Application is based on the following four grounds, contained in the affidavit of Patricia Mutesi, Principal State Attorney sworn on 7th June, 2012;
    i) That the Reference No. 3 of 2011 is time barred;
    ii) That the Applicant is the Respondent in Reference No. 4 of 2011, *Omar Awadh Omar and 6 Others Vs the Attorney General of the Republic of Uganda* which has similarity of facts and in which it is also averred that the Reference is filed out of time.
    iii) That Appeal No. 2 of 2012, which arose from Reference No.4 of 2011, aims to plead limitation and therefore the outcome of that Appeal will substantially affect Reference No. 3 of 2011.
    iv) That it is in the interest of justice to stay proceedings pending hearing and determination of Appeal No. 2 of 2012.
13. Mr. James Aggrey Mwamu, the President of the East Africa Law Society, in a reply to the sworn affidavit, averred as follows:
    i) That the Respondent is not a party in Reference No. 4 of 2011 aforesaid;
    ii) That the interests of the Respondent are not intertwined with the interest of any party in the aforesaid Reference;
    iii) That the outcome of that Reference does not affect the interests or relief sought by the Applicant in Reference No. 3 of 2011;
    iv) That the issue of limitation of time is not a factor to be determined in Reference No. 3 of 2012;
    v) That the outcome of Appeal No. 2 of 2012 does not have relevance to the determination of Reference No. 3 of 2011;
    vi) That the grant of the orders sought may delay justice and prejudice the Respondent;

It is the Respondent's argument in a nutshell that the orders should not be granted.

**Submissions**

14. Mr. Wanyama Kodoli, learned Counsel for the Applicant in his submissions, told the Court that the Application was brought under Rules 1(2) and 21 (1) of the Rules and he stated that it was an Application for orders to stay proceedings in Reference No. 3

of 2011 pending the determination of Appeal No. 2 of 2012 by the Appellate Division of this Court.

15. He repeated the grounds on which the Application was based but more specifically submitted that the Applicant is the Respondent in Reference No. 4 of 2011 which arose out of the same events and the same facts and in which the Attorney General of the Republic of Uganda pleaded limitation of time and that the outcome of that Appeal will substantially affect Reference No. 3 of 2011. The reason it will substantially affect it, in his view, is that if the Appeal is allowed, Reference No. 3 of 2011 will collapse. He further submitted that in case the Appeal is dismissed, the Applicant will apply for consolidation of the two References in order to expedite their hearing.
16. Counsel finally submitted that the interests of justice dictate avoidance of a multiplicity of the Court's decisions in similar matters and invited the Court to exercise its inherent power conferred by Rule 1(2) of the Rules and grant the stay sought.
17. Mr. Muiruri Ngugi, Counsel for the 1st interested party, on his part, associated himself with the submissions of the Applicant and argued that the two References have the same genesis and facts. He contended, therefore, that for proper administration of justice, it would be prudent to stay proceedings pending the determination of that Appeal for avoidance of conflicting decisions.
18. Mr. Steven Agaba, Counsel for the 2nd Interested Party associated himself completely with the Applicant on the main ground; that they are both Respondents in the aforesaid References which have similar facts and the stay order should therefore be granted.
19. Prof. Frederick Ssempebwa, Counsel for the Respondent opposed the Application. He conceded, however, that it is in the inherent powers of the Court to stay proceedings in deserving cases. Counsel's objections were based on the following grounds:
    i) That the Rules do not prescribe any circumstances under which the Court's inherent powers to stay proceedings can be exercised;
    ii) That the Respondent's main interest would be the expeditious disposal of proceedings in the matter.
    iii) That contrary to the Respondent's interest in the Reference, the Applicant has never shown any desire to expeditiously ensure the disposal of this matter and if it has had any, it would not have argued for the consolidation of Reference No. 3 of 2011 and Reference No. 4 of 2011 at this stage; that rather the Applicant should have raised it at the Scheduling Conference.
    iv) That it is a fact that the question of limitation of time was listed among the other issues to be argued at the hearing and that delay to proceed as agreed connotes a lack of interest in the disposal of the Reference from which the present Application arises.
    v) That the Applicant appears to be convinced that it will succeed in Appeal No. 2 of 2012 so that Reference No. 3 of 2011 will automatically collapse, yet each case is decided on its own facts.
    vi) That it was the Respondent's submission that, while conceding that the Court needs to avoid conflicting decisions, the Application should be dismissed on the ground that it would delay the disposal of Reference No. 3 of 2011 which has to be determined on different issues in any event.

20. In reply (rejoinder), the Applicant conceded that limitation of time was one of the issues agreed upon at the Scheduling Conference. But that thereafter the Attorney General of the Republic of Uganda realized during consultations that in Reference No. 4 of 2011, an Appeal had been instituted. Therefore given that both References have the same content and the same facts, it appeared prudent to file this Application to stay the instant Reference and seek guidance from the Appellate Division of the Court on the issue of limitation of time.

**Determination**

We have carefully considered the evidence and submissions of the parties to this Application and we opine as follows:

21. This Application was brought under Rules 1(2), and 21(1) of the Rules. Rule 1 (2) in particular reads as follows:
"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."
22. It is clear that the inherent power in granting or refusing the stay of proceedings derives from this Rule.
23. We share the Respondent's view that this Application should have been raised at the Scheduling Conference and that would also have saved time. In the interest of justice, however, this Court must consider the other factors to grant or to dismiss the application.
24. The first is the possibility of conflicting decisions. It is our considered view that a stay may be granted where there are multiple proceedings pending in both Divisions of the Court and the decision of the Appellate Division might affect the outcome of the other proceedings. In the instant Application, we think that due to the nexus between both References as shown above, the outcome of Appeal No. 2 of 2012 might have an impact on Reference No. 3 of 2011. At this stage we cannot say that such impact will be substantial or not, but it suffices that we foresee an impact. We believe that a common sense justification to a stay such as is sought here, is to aim at avoiding conflicting decisions and the possibility of rendering some of them nugatory. Consequently we find it prudent to await for the outcome of Appeal No 2 of 2012.
25. The second consideration is balance of convenience. The questions which the Appellate Division is handling in Appeal No. 2 of 2012 do overlap some aspects of Reference No. 3 of 2011 as shown elsewhere above while discussing the nexus between the two cases. The balance of convenience, in our view, lies in favour of all parties. It is therefore in the interest of good and equitable justice for this Court to await their determination by the higher Court.
26. We are comforted by the same approach taken by Justice Adamu Dalhatu of the Court of Appeal of Lagos, Nigeria in CA/L/255/05 *Mobil Producing Nigeria Unlimited V. His Royal Highness Oba Yinusa A. A* where he stated:
"…it will be futile to allow the proceedings at the lower Court to continue while an appeal is before this court challenging its jurisdiction to hear and determine the suit against them at the lower court. At the end of the day, if their appeal here at succeeds, the whole proceedings of the lower court will be declared a nullity and be struck out

however well conducted it might have been. It is therefore necessary to avoid this undesirable result by ordering a stay of proceedings in the present case pending the determination of the appeal against the trial court jurisdiction."

We are in complete agreement with the sentiments of the learned Judge.

27. The final consideration is one of injury. We do not see any injury to the Respondent which cannot be adequately compensated if this Application is granted. If there is one, like the delay to dispose of the Reference as argued by the Respondent, it would be compensated later by the final disposal of the Reference after the outcome of the Appeal is known and taken into consideration.
28. We are also fortified by this Court's position in *Reference No. 3 of 2010, (The Independent Medical Legal Unit case)* where, on a similar question, we held as follows:
29. "This Court has discretion to stay proceedings for sufficient cause. … We nevertheless find that in the circumstances of this case, the delay is not fatal. We are of the view that an appeal on grounds of jurisdiction of this Division to the Appellate Division should be disposed of first before we can comfortably proceed to determine the Reference on the merits because jurisdiction is the matter that goes to the root of the Reference."

    We reiterate the above findings as applicable in the circumstances of the Application now before us.
30. In view of the foregoing, we find that despite the possible delay, it is nevertheless appropriate to await the outcome of the aforesaid Appeal. The interest of justice would be better served by granting a stay and we accordingly grant the Application as prayed.

Costs thereof shall abide the outcome of Appeal No. 2 of 2012.

It is so ordered.

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East African Court of Justice – First Instance Division
Application No.12 of 2012

Arising from Reference No.2 of 2011

**The East African Law Society And The Attorney General of the Republic of Uganda & The Secretary General of the East African Community**

Johnston Busingye PJ, John Mkwawa, J and Isaac Lenaola, J
February13, 2013

*Court's discretion to receive new evidence - Threshold for granting leave to produce additional evidence after close of pleadings.*

*Rule 46 of the East African Court of Justice Rules of Procedure, 2010*

The Applicant sought the leave of the Court to produce additional evidence in electronic format after the close of pleadings and the alleging that the hurdles to accessing the evidence had been only overcome after the Scheduling Conference. While opposing the application, the 1st Respondent claimed that the belated attempt to introduce new evidence would render previous proceedings nugatory, cause delay, prejudice and defeat the cause of justice.

**Held:**

1) While addressing the issue of whether or not to grant leave for the production of additional evidence, the court found that there may be exceptional cases where an application should be granted even though all three requirements set out in the case of Ladd v Marshall had not been fulfilled.
2) That the import of Rule 46 (1) was to ensure that: no evidence was shut out even after pleadings have closed; and to enable the Court exercise its discretion whenever necessary to afford an opposing party an adequate opportunity to rebut the new evidence and if necessary, file fresh evidence to contradict it.
3) No prejudice would accrue to the Respondents as they would have an opportunity to challenge its veracity and to put forward evidence to counter it. Thus the Applicant's prayer for leave to produce additional evidence was granted.

**Cases cited:**

Brathwaite v Chief Personnel Officer H.C. Civil Case No. 687 of 2007
Charlesworth v Relay Roads Ltd (2000) 1WLR 230
Ladd v Marshall (1954) C.A. 745

**Ruling**

1. The East African Law Society brought this Notice of Motion dated 2nd September 2012 under the provisions of Rule 46(1) of the Rules of Procedure of this Court and

save for the prayer on costs, the only substantive Order sought is the following:
"That this Honourable Court be pleased to grant leave to the Applicant to produce additional evidence in form of documentation and electronic format after the close of pleadings."

2. The grounds in support are that;
   i) At the Scheduling Conference, the parties had agreed and consented that all evidence would be tendered by way of affidavits.
   ii) The evidence which "hitherto had been cumbersome to obtain and required the surmounting of diplomatic hurdle and corporate red-tape" has now become available and can be used in the Reference.
   iii) The Applicant has all along (including at the time when the Reference came up for Scheduling Conference), been in active negotiations with the persons/ institutions with the custody of the evidence in issue in the instant Application, with a view to availing the same to the Applicant for use in the Reference and it was not until 25th June, 2012 that there was a break-through in the negotiations and hence the necessity to make the present Application.
   iv) That owing to the wide implications of the outcome of the Reference coupled with the sanctity of the right to be heard, it will meet not only the ends of, but also serve the wider interests of justice to grant the orders sought.
   v) This Application is made in good faith and in order to accord the Respondents a chance to respond and/or react to the evidence intended to be used.
   vi) This Application seeks to avoid trial by ambush and is geared at achieving a fair and equitable trial.
   vii) The Application has been made without undue delay and only as soon as the evidence was made available to the Applicant.
   viii) The Respondents do not stand to suffer any loss, prejudice or damage that is likely to outweigh the interests of justice that the fair hearing stands to serve.
   ix) The proposed evidence is in the nature of electronic format which was not expressly agreed upon for production at the Scheduling Conference hence the instant Application for leave to adduce the same.
   x) It is in the best interests of justice that the leave sought be granted so as to determine the real question in controversy between the parties.
3. In the supporting Affidavit sworn on 3rd September 2012 by James Aggrey Mwamu, the Vice President of the Applicant Society, the same grounds are reproduced and we see no need to repeat them.
4. The 1st Respondent filed a Replying Affidavit sworn on 8th January 2013 by one, Eva Kabundu, a State Attorney in the Chambers of the Attorney General, Ministry of Justice and Constitutional Affairs, Uganda. It is her response that at the Scheduling Conference, parties agreed that evidence shall be tendered by way of Affidavits and all parties duly complied with that directive and pleadings have since closed. That the belated attempt at introducing new evidence is meant to boost an otherwise inadequate case which would amount to trial by ambush. Further, to allow introduction of new evidence would render previous proceedings nugatory and parties would be forced to re-conference which would cause undue delay, prejudice the 1st Respondent and defeat the cause of justice.

5. The 2nd Respondents on its part chose not to say anything regarding the Motion, subject of this Ruling.
6. We have taken into account the oral submissions made by learned counsel for the parties and on our part, we deem it fit to opine as follows:-
   Firstly, Rule 46 of the Rules of Procedure for this Court specifically outlaws the filing of any documents after pleadings have closed but under sub-Rule 1 thereof, such filing may be done only with the leave and at the discretion of the Court.
7. As we understand the law on the subject, discretion can only be exercised if a party seeking to adduce new evidence meets the threshold set by Lord Denning in the case of *Ladd vs Marshall (1954) C.A. 745* where the learned judge stated as follows:
   "In order to justify the reception of new evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."
8. We are in agreement with the learned judge's observations and are also in agreement with the position taken by Refer, J. in *Brathwaite vs Chief Personnel Officer H.C. Civil Case No. 687 of 2007 (Barbados)* where the Judge agreed with the reasoning in *Ladd (supra)* and stated that the rationale for the decision was well explained in *Cross and Tapper on Evidence, 10th Ed* at page 9 where the authors stated as follows:
   "The rule in *Ladd v Marshall* is designed to ensure that litigation is not unduly prolonged, but as such, it is subservient to the principle that a litigant should not succeed from fraud, and in such a case fresh evidence may be admitted notwithstanding the restrictions imposed by the rule, thus avoiding the need to institute fresh litigation to set aside the judgment."
9. The Learned Judge went even further to argue that even if the threshold in Ladd had not been met, exceptional circumstances may require that the prayer for additional evidence may still be granted. She stated as follows in that regard;
   "Phipson on Evidence(16th ed.) readily accepts the applicability of *Ladd v Marshall* to High Court proceedings and further posits that the powers of a High Court Judge in these circumstances are in fact wider than the Court of Appeal's. At page 360 of Chapter 13 on this subject of the admission of new evidence it states as follows;
   A trial judge has a discretion to receive new evidence … And That In *Charlesworth v Relay Roads Ltd (2000) 1WLR 230* it was held that the trial judge had the necessary jurisdiction to allow a party to amend his pleadings and to call new evidence in [the] circumstances. Whilst the court held that the Ladd v Marshall principles should be in the forefront of the court's mind, it also expressed the view that a trial judge is entitled to be more flexible than the Court of Appeal when considering such an application to admit new evidence. There may be exceptional cases where the application should be granted even though all three *Ladd v Marshall* requirements are not fulfilled."
   We associate ourselves with the above erudite findings and would apply them squarely to the Application before us.
10. Secondly, and in line with the law as expressed above, we see no reason to doubt the

Applicant's submission that it was unable to obtain the evidence, now sought to be adduced, before the Scheduling Conference, and the reasons as elsewhere set out above are not outlandish. In any event, we are also convinced that the evidence is not irrelevant and from a casual reading of the transcripts annexed to Mr. Mwamu's Affidavit, the evidence has a direct bearing on Reference No. 2 of 2012 and the issues raised for determination therein.

11. Thirdly, we see no prejudice at all if the evidence is admitted as the Respondents have an opportunity to challenge its veracity by putting forward evidence to counter it. The fact that parties may need to re-open their respective cases should not be a bar in the circumstances and we are fortified in that position by the fact that the threshold set by Rule 46(3) of the Rules is much lower than even the one set in the decisions elsewhere discussed above. That sub-rule grants the court very wide discretion to order production of a document in evidence even long after pleadings have closed, if such production is necessary to meet the ends of justice.
12. Fourthly, being a court of first instance, it is best to allow all parties an opportunity to tender all evidence that they deem relevant to enable the court make a fair and informed decision when it has had the opportunity to examine all possible evidence on the issue(s) placed for determination before it.
13. In a nutshell, it is our view that the import of Rule 46 (1) is to ensure that no evidence is shut out even after pleadings have closed and to enable the Court exercise discretion whenever necessary to do so and to afford an opposing party adequate opportunity to comment on and rebut the new evidence tendered by the other party and if necessary, file fresh evidence to contradict it.

    In conclusion, we find no credible reason to deny the Motion and will now allow it in the following terms;

    i) The Applicant, the East African Law Society, shall be granted leave to produce additional evidence in Reference No. 2 of 2012 pending before this Court for determination.
    ii) The evidence to be produced shall be in the form of documentation and also in electronic format.
    iii) The additional evidence shall be served upon the Respondents within 21 days of this Ruling.
    iv) The Respondents are at liberty to file any evidence in rebuttal within 21 days of service of the additional evidence.
    v) Parties will thereafter appear for directions on how to proceed with the matter.
    vi) Costs of the Motion will abide the determination of Reference No. 2 of 2012.

Orders accordingly.

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East African Court of Justice - First Instance Division
Application No. 15 of 2012

Arising from Reference No.1 of 2012

**The Secretary General of the East African Community And Angella Amudo**

Mary Stella Arach-Amoko, DPJ, John Mkwawa, J, Isaac Lenaola, J.
May 2, 2013

*Limitation of time - Employees of the Community – Whether a Statement of Claim or Reference should be filed.*

*Articles 30(2) and 31 of the Treaty- Rule 21 of the East African Court of Justice Rules of Procedure, 2010 - Rules 24 and 25 of the East African Court of Justice of the Rules of Procedure, 2013*

The Applicant sought an order striking out the Respondent's Statement of Claim No. 1 of 2012, filed on 27th September, 2012 alleging that it was brought four years after the actions complained of took place and was time-barred under Article 30(2) of the Treaty.

The Respondent contended that this was an employment dispute brought under Article 31 of the Treaty and was not instituted under Article 30 and therefore limitation of time did not apply.

**Held:** Article 31 is limited to disputes relating to the Community and its employees and does not extend to the jurisdiction under Articles 27 and 30 of the Treaty. Article 30(2) of the Treaty does not apply to proceedings under Article 31. The application was dismissed.

**Case cited:**
Attorney-General of the Republic of Kenya v Independent Medical Legal Unit, EACJ Appeal No.1 of 2011(distinguished)

**Ruling**

1. This is an Application brought by the Secretary General of the East African Community, seeking an order that the claim by Angella Amudo, the Claimant in Claim No. 1 of 2012 be declared as time-barred. The Application is expressed to be brought under Rule 21 of the Court's Rules of Procedures and is supported by an Affidavit sworn on 6th December, 2012, by one, Jean Claude Nsengiyumva, Deputy Secretary General (Finance and Administration) of the East African Community.
2. The Applicant's case is that in the Statement of Claim, the Claimant (now the Respondent in the Application) stated that the actions complained of "took place in

September, 2008" while the Claim was filed on 27th September, 2012, a period of over four years. That, therefore, invoking Article 30(2) of the Treaty, it is his contention that the Claim was filed outside the two month's limitation period prescribed by the said Article and is consequently time-barred and should be struck off.

3. In response, the Respondent filed a Replying affidavit sworn on 8th March, 2013 and after detailing out the gist of her claim, which we deem unnecessary to reproduce in this Ruling, then stated at paragraph 14 of the said Affidavit:
"14.That the Respondent's application based on the limitation period provided under Article 30 of the Treaty is clearly misconceived and irrelevant to an employment dispute brought to Court under Article 31 of the Treaty. I am advised by my Advocate and I also genuinely believe that a Statement of Claim under Rule 25 cannot at the same time be a Reference under Rule 24 of the Rules of Procedure of this Court and vice-versa."
4. Further, she has added in paragraph 15 of the Affidavit, the point that the; "subject matter for determination of the court is substantially the import of the Staff Rules and Regulations notwithstanding that the authority under which they were made is the Treaty or that in determining the dispute, I shall refer to some provisions of the Treaty."
5. In Submissions before us, Mr. Steven Agaba, Learned Counsel for the Respondent also argued that Article 31 flows from Article 30 and that any reference to a "natural person" in Article 30 must necessarily also refer to an "employee" of the Community who has raised a dispute under Article 31, aforesaid.
6. He also placed reliance on two decisions of the Appellate Division of this Court i.e. *Attorney-General of the Republic of Kenya vs Independent Medical Legal Unit, EACJ Appeal No.1 of 2011* and *Attorney-General of the Republic of Uganda and Anor vs Omar Awadh Omar and 6 Others others*, EACJ Appeal No. 2 of 2012, where the Learned Justices of Appeal held *inter-alia* that the objective of Article 30(2) is legal certainty and that the Treaty has not envisaged a situation where there is an exception to the two months' limitation period created by that Article.
7. On his part, Mr. James Nangwala, Learned Counsel for the Respondent, in his response, termed the Application wholly misconceived for the reasons that Article 30 of the Treaty must be read in isolation with Article 31 because whereas Article 30 is specific as to what matters can be time-barred by the two months' rule, Article 31 has no such bar. That the procedure to be used in invoking either of the Articles is also different and in the case of Article 30, it is a "Reference "under Rule 24 of the Court's Rules of Procedure while under Article 31, it is a "Statement of Claim" under Rule 25 of the said Rules.
8. Further, it is his contention that whereas Article 31 concerns itself with interpretation of the Treaty pursuant to jurisdiction conferred on this Court by Article 27, Article 31 limits itself to the application and interpretation of Staff Rules where there is a dispute in that regard between the Community and its employees.
9. He has also relied on *Halsbury's Laws of England, 3rd Edition, Volume 36, paragraphs 579 and 597* to argue that where the words of a statute are clear and unambiguous; there is no need to look elsewhere to discover their true meaning and intention.
10. We have carefully considered the Application, the response to it and rival submissions

on record and our view of the matter is as follows:

11. Firstly, we are bound by the decisions in the *Independent Medical – Legal Unit and Omar Awadh Cases (supra)*. In those decisions, the Appellate Division addressed its collective mind to the provisions and import of Article 30(2) of the Treaty. In the latter case and following its decision in the former, the Court rendered itself as follows:

    "Moreover, 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, condone, to waive or to modify the prescribed time limit for any reason."

12. Secondly, and without deviating from the above holding, it is our considered view that an interrogation of the jurisdiction of this Court under the Treaty is necessary in determining whether the holding extends to matters filed under Article 31 of the Treaty. In that regard, a concise reading of the Treaty would show that this Court is conferred jurisdiction in certain situations including in the following matters:
    i) Jurisdiction over the interpretation and application of the Treaty -Article 27(1)
    ii) Disputes between the Community and its employees – Article 31
    iii) Preliminary Rulings by way of case stated upon request by Courts and Tribunals in Partner States – Article 34
    iv) Disputes between Partner States regarding the Treaty submitted to the Court under a special agreement – Article 32
    v) Arbitration in situations envisaged by Article 32 of the Treaty
    vi) Advisory opinions – Article 36
13. The Court shall also have such other original, appellate, human rights, and other jurisdiction as will be determined by Council at a subsequent suitable date as provided for by Article 27(2) of the Treaty.
14. In that context, our reading of the Treaty would show that Article 30 must be read, in terms of jurisdiction , with Article 27, hence the words in Article 30 that; "Subject to Article 27, any person who is resident in a Partner State may refer for determination by the court, the legality of an act, regulation, directive or action of a Partner State or an institution of the Community on the grounds that such an Act, regulation, directive, decision or action is unlawful or is an infringement of the provision of this Treaty."

    Article 27(1) then provides that the Court shall "initially have jurisdiction over the interpretation and application of this Treaty."

15. The jurisdiction in both Articles is clearly limited to matters relating to the Treaty and nothing else. Further, the office of Secretary General, the Respondent in the Claim, is neither a Partner State nor an Institution of the Community under Article 9 of the Treaty as read together with Article 30 above. The import of both provisions is that no proper claim can be made by an employee qua employee against the Secretary General by the invocation of Article 30.

    Conversely, Article 31 is titled, "Disputes between the Community and its Employees." For avoidance of doubt, the Article provides as follows:

    "The court shall have jurisdiction to hear and determine disputes between the Community and its employees that arise out of the terms and conditions of employment

of the employees of the Community or the application and interpretation of the Staff Rules and Regulation and Terms and Conditions of Service of the Community."

16. It is obvious, therefore, that Article 31 is limited to disputes relating to the above issues only and do not extend to the jurisdiction under Articles 27 and 30 and we dare say that the jurisdiction under Article 31 is unique and special in that it gives the Court jurisdiction akin to a Court dealing with employment and labour relations but limited to employees of the Community.
17. We must now juxtapose the above findings with the provisions of Article 30(2) for a clearer understanding of the issue at hand. It 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."
18. The time limit imposed by the above Article, in our humble view, cannot be applied to every instance in the Treaty or to every jurisdiction conferred by the Treaty (set out above) but only to matters in Article 30 as read with Article 27 hence the specific rider that only "Proceedings provided for in this Article" shall be subject to the two month's limitation period.
19. If the framers of the Treaty had intended that the two months' limitation period should be invoked in all proceedings under the Treaty as opposed to proceedings under this Article (i.e. Article 30), nothing would have been easier to do. That they chose to do as they did, does not give this Court the mandate to reduce, extend, waive, condone or modify their language and intent which is clearly discernible from a clear reading of all the Articles referred to above.
20. We must add here that our reading of the decisions in *Independent Medical Legal Unit and Omar Awadh,(supra)* would lead to only one conclusion; that the Appellate Division was addressing the applicability of the provisions of Article 30 of the Treaty and not Article 31 thereof and so the two decisions can be distinguished from the one before us.
21. We, therefore, accept the guidance provided by Halsbury's Laws of England( above) that:
"If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning."
22. Further, that; ''Whenever there is a particular enactment and a general enactment in the same statute, and the latter taken in its most comprehensive sense, would override the former, the particular enactment must be operative ,and the general enactment must be taken to affect only the parts of the statute to which it may properly apply. This is merely one application of the *maxim generalia specialibus non derogant*."
23. We adopt the above statements as expressive of the intention of the framers of the Treaty and in finding that we see no ambiguity at all in either Article 30 or Article 31 for reasons we have given.
24. Thirdly ,we need not address the argument that the Claimant is a ''natural person" or a "resident of a Partner State" because once we have held that Article 30(2) does not apply to proceedings under Article 31, the matter becomes moot.

25. Fourthly, we agree with the Respondent that reading Rules 24 and 25 of the Court's Rules of Procedure, the perpetration of the intent to separate proceedings under Article 30 and those under Article 31 is clearly discernible. Proceedings under Article 30 are by way of a "Reference" while those under Article 31 are by way of a "Statement of Claim" and the manner of handling both are also procedurally different. For avoidance of doubt in that regard, Rule 24(1) provides as follows;
    ''A reference by a Partner State ,the Secretary General or any person under Articles 28,29,30 respectively of the Treaty shall be instituted by presenting to the Court an application." Article 25(1) then provides as follows:
26. "A claim for determination of a dispute between the community and its employees under Article 31 of the Treaty shall be instituted by presenting to the First Instance Division a statement of claim"
27. It is obvious to us that different procedures in each instance are applied not for cosmetic value but because it was precisely intended that different legal parameters should be set in each of the two jurisdictional situations.
28. Lastly, a question may be raised as to whether proceedings under Article 31 or arbitration proceedings under Article 32 or indeed any other proceeding other than one under Article 30 as read with Article 27 are open-ended and are not subject to the time limitation under Article 30(2) of the Treaty. The issue was not raised nor addressed by parties; and important as it may be, in fairness to all parties, we do not consider it imperative to address at this juncture in this matter. It is however our hope that in the future, opportunity may well arise when the issue may be sufficiently and properly addressed.
29. In conclusion, we find that the Application before us is misguided and misconceived and is hereby dismissed.

As to costs, let the same abide the outcome of Claim No.1 of 2012.

It is so ordered.

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East African Court of Justice - Appellate Division
Appeal No. 1 of 2012

Appeal from the Ruling of the First Instance Division in Reference No 8 of 2010 before: M.S. Arach Amoko, DPJ; J.J. Mkwawa, and Isaac Lenaola, JJ dated 1st December 2011

**The Attorney General of the Republic of Rwanda And Plaxeda Rugumba**

Before: H.R. Nsekela P, P.K. Tunoi VP; E.R. Kayitesi, L. Nzosaba and J.M. Ogoola, JJA
June 22, 2012

*No exhaustion of local remedies is required - The onus is on the Appellant to show the Respondent's knowledge of the date of arrest and detention.*

*Articles: 6 (d), 7(2), 27, 30, of the EAC Treaty – Articles 3 and 4 of the African Charter on Democracy, Elections and Governance- Rwandan Code of Criminal Procedure- Rwanda Code of Civil Procedure*

On 8th November 2010, the Respondent filed this Reference No 8 of 2010 in the First Instance Division averring that the arrest of her brother Lieutenant Colonel Seveline Rugigana Ngabo, by the Appellant's agents and detention without trial was 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 the principles of good governance and universally accepted standards of human rights.

The First Instance Division concluded that: the Court had jurisdiction to hear and determine the Reference;, that the Reference was filed within the time prescribed by the Treaty; that the Reference was not barred by the rule of exhaustion of local remedies; and finally that the Appellant/Respondent, the Republic of Rwanda, had breached the aforesaid Articles of the Treaty. The Court granted the declaration as sought by the Applicant/ Respondent.
Aggrieved by the said decision, the Appellant on 6th February 2012 lodged this appeal.

**Held:**

1) The failure by the appropriate Authorities of the Republic of Rwanda:(a ) To produce Lt. Col. Seveline Rugigana Ngabo before a competent Court of law beyond the forty eight (48) hours prescribed under Rwandan Laws; and(b) To charge him with specific offences for his arrest and detention, as well as to inform him, his of family or his lawyers the time of his arrest/detention-for a period of five (5) months, during which time he was held incommunicado was fundamentally inconsistent with Rwanda's express undertakings under Articles 6 (d), 7 (2) and 8 (1) of the Treaty: These failures, singly and collectively, constituted an infringement of the said provisions of the Treaty.
2) Unlike other legal regimes in this field, the EAC Treaty provides no requirement for

exhaustion of local remedies as a condition for accessing the East African Court of Justice.

3) The onus was on the Appellant to establish the time at which the detainee or his family members or his lawyers were told or otherwise made aware of the detention of Lt. Col. Ngabo. The Appellant failed to discharge the burden of showing the Respondent's knowledge of the critical date. He cannot now turn around to impeach the Respondent for any failure to file the Reference within the two (2) months prescribed under Article 30 (2) of the Treaty.Therefore the appeal failed.

**Cases cited:**

Attorney General of Kenya v Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011

Interhandel Case (Switzerland v. United States), 1959 I.C.J. 6 (Mar. 21)

James Katabazi & 21 Others v EAC Secretary General and the Attorney-General of Uganda, EACJ Reference No 1 of 2007

**Judgment**

**Introduction**

1. By a reference dated 8th November 2010 lodged in the First Instance Division on the same date, Plaxeda Rugumba, the Respondent herein, and who described herself as the natural elder sister of one, Seveline Rugigana Ngabo; ("the subject"); a Lieutenant Colonel in the Defence Force of the Republic of Rwanda, a member of the East African Community sought, *inter alia*, the following declarations:-
   (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 the principles 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 under Articles 29(1), is wrongful.
2. The Respondent deponed, in her affidavit in support of the Reference, that she was informed by her sister-in law that on 20th August, 2010, her brother Lieutenant Colonel Ngabo was called from his home at Kabeza, Kanombe, Kicukiro Commune to his office; where he was immediately placed under arrest and, thereafter, detained by the agents of the Rwanda Government.
3. His next of kin, including his wife and children, have not been informed of where he is detained and Lt. Col. Ngabo has not been visited by his family doctor, nor a member of the Red Cross and is held incommunicado.
4. Up to the time the Reference was filed, Lt. Col. Ngabo had not been formally charged before any Court of Law in Rwanda, nor had it been disclosed what offence he is alleged to have committed.
5. The Respondent averred in the Reference that Lt. Col. Ngabo's wife was not in a position to commence *habeas corpus* application to cause the release of her husband

within Rwanda as the Government was hostile to such process and her attempts to follow up the detention of her husband had led to her being harassed into hiding.

6. The Respondent is an adult Ugandan of Rwandan extraction, and stated that she filed the Reference to protect the fundamental human rights of her brother.
7. It was the Respondent's case that the Appellant was in breach of Articles 6(d) and 7(2) of the Treaty when it unlawfully detained the subject. Moreover, since the Appellant had specifically subscribed to the African Charter on Human and Peoples Rights 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), the Respondent averred that, the detention of the subject should be held to be in breach of the Treaty.
8. The Respondent further contended that Article 6(d) of the Treaty 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, and the protection of human and peoples' rights as enshrined in the African Charter on Human and Peoples Rights. It was her submission that she had 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 that those actions were against the Rule of Law, and clearly a breach of Articles 6(d) and 7(2) of the Treaty (let alone of the Laws of Rwanda).
9. As to jurisdiction, she averred 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 without due process, was in breach of the Treaty and the Government of Rwanda should bear culpability in that regard.
10. The Respondent submitted that she had no legal obligation to exhaust local remedies in Rwanda before filing the present Reference. She stated that 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 by any Local Court in Rwanda.
11. The Respondent asserted 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 arisen, in the instant case, the subject was arrested on or about 20th August 2010 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." She submitted therefore that 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.

**Response to the Reference**

12. It is noteworthy that the Reference had enjoined the Secretary General of the EAC as a party for alleged failure to investigate the State of Rwanda for not fulfilling its obligations under the Treaty; and to submit his finding as mandated by Article 29(1) of the Treaty. However, the case against him was dismissed by the Court below and hence his absence in this appeal.

13. The response by the Appellant was terse. It opposed the Reference and sought the Court of the First Instance Division to dismiss the Reference on the following grounds:-
    (i) The reference was filed in breach of Article 30(2) of the Treaty and it was accordingly time-barred;
    (ii) The Court has no jurisdiction to determine the issues raised since the Court has not been clothed with jurisdiction over abuse of human rights;
    (iii) The reference cannot be entertained by the Court since local remedies have not been exhausted;
    (iv) 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."

**Decision of the First Instance Division**

14. In a well-reasoned judgment the Court below concluded: firstly, that the Court had jurisdiction to hear and determine the Reference; secondly, that the Reference was filed within the time prescribed by the Treaty; thirdly, that the Reference was not barred by the rule of exhaustion of local remedies; and finally that the Appellant/ Respondent, the Republic of Rwanda, had breached the aforesaid Articles of the Treaty. The Court then proceeded to grant the declaration as sought by the Applicant/ Respondent.
15. Aggrieved by the said decision, the Appellant on 6th February 2012 lodged this appeal based on five grounds of appeal which were listed in the Memorandum of Appeal as follows:-
    "1. The East African Court of justice (EACJ) had no jurisdiction to entertain the reference;
    2. It was not permissible to file the application out of time;
    3. The applicant should have exhausted local remedies before filing the reference, a requirement of Customary international Law;
    4. The declaration issued by the First Instance Division that 2nd Respondent's arrest and detention of Lieutenant Colonel Ngabo was in violation of the law of Rwanda had no basis in law, because the Rwanda courts had issued a similar declaration;
    5. In rendering justice on Rugigana's irregular detention, Rwanda was fulfilling its obligations under national laws and international instruments ratified by Rwanda, including Articles 6(d) and 7(2) of the EAC Treaty. Consequently, there is no legal or factual basis for this Honorable Court to declare that Rwanda is in breach of the fundamental principles of the Community provided for in Articles 6(d) and 7(2) of the EAC Treaty."
16. The Appellate Division of the Court is mandated to hear and dispose of this appeal under Article 23(3) and 35A of the Treaty establishing the East African Community (the "Treaty") and Rule 77 of the EACJ Court Rules of Procedure.

**Scheduling Conference**

17. During the Scheduling Conference the Appellant's Counsel stated that he would not

argue all the grounds listed in the memorandum of appeal.

18. It was also noted that the judgment of the Court below did not address, discuss nor make findings on each of the grounds of appeal seriatim.

**Jurisdiction**

19. The Appellant, through his learned Counsel Mr. Havugiyaremye submited that the Court below had no jurisdiction to entertain the matter which concerns the arrest and detention of Lt. Col. Ngabo. The learned Counsel averred, further, that the said Court in considering the issue had gone beyond its interpretative mandate and did not respect the provisions of the Vienna Convention on the Law of Treaties in that it had not interpreted the Treaty "in good faith and in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its objects and purposes."
20. Though Mr. Havugiyaremye admitted before us that the Court below had jurisdiction to interpret the Treaty, he however contended that in doing so the Court went beyond its interpretative mandate which event clouded and erased its jurisdiction over the matter.
21. Mr Rwakafuuzi, learned counsel for the Respondent, had vigorously argued in reply that by dint of Article 30(1) of the 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 the Court to determine whether or not that act or decision infringes on any provision of the Treaty.
22. The crux of the Appellant's case is simple: namely, that since the matter in issue relates to human rights, the Reference was ill-conceived and it ought not to have been entertained by the court, as Article 27(1) of the Treaty specifically limits the jurisdiction of the Court only to the interpretation and application of the provisions of the Treaty.

**The EAC Treaty and Human Rights**

23. It is trite that the jurisdiction of the Court to entertain human rights disputes still awaits the operationalisation of a Protocol under Article 27 (2). It must follow therefore that the Court may not, as of now, adjudicate disputes concerning violations of human rights per se: see *James Katabazi & 21 Others v EAC Secretary General and the Attorney-General of Uganda (Reference No 1 of 2007*).
    However, of relevance to this appeal is Article 6 (d) of the Treaty which unambiguously states that one of the fundamental objectives of the Treaty is:
    "good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equity, as well as the recognition, promotion of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples Rights;"
24. The commitment by the Partner States to the above-quoted objective is reiterated in Article 7(2), which emphasizes thus:
    '(2) The Partner States undertake to abide by the principles of good governance, including adherence to the principle of democracy, the rule of law, social justice and

the maintenance of universally accepted standards of human rights.'

25. Though the EAC Treaty is bereft of a chapter on Human Rights, nonetheless, it contains the hint of such rights in a number of its provisions. The Hon Mr Justice James Ogoola, Judge of Appeal, EACJ and Lord Justice COMESA Court of Justice, in his Keynote Speech: "Where Treaty Law Meets Constitutional Law", presented at the University of Dar es Salaam on 18th May 2012, observed as follows:
"The EAC Treaty is emphatic in its intention under Article 27(2) to extend human rights jurisdiction to the EACJ, at a suitable subsequent date. One possible interpretation of this is to say that the Treaty's "hints" on human rights are ineffectual. Another, and more plausible view, is to hold that there is a layer of inchoate human rights in the Treaty, waiting for practical implementation and operationalisation via the channel envisaged in article 27(2). In the case of *James Katabazi & 21 Others v EAC Secretary General and the Attorney General of Uganda (Reference No. 1 of 2007*: Judgment of 1st November, 2007), the EACJ gravitated toward the second view. The Court held that:
'While the Court will not assume jurisdiction to adjudicate 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'.
26. In all its subsequent cases on this matter of human rights jurisdiction, the Court has consistently upheld the same view, which is articulated in the *Katabazi case* above- see, for instance, the recent case of *Attorney General of Kenya v Independent Medical Legal Unit (Appeal No. 1 of 2011: Judgment of 15 March 2012)*, in which the Appellate Division held that:
'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."
27. We find, as indeed this Court did hold in the above case of Independent Medical Legal Unit, that there is in this instant Reference:
"a cause of action flowing from the Treaty (that is different and distinct from violations of human rights) on which to peg the Court's jurisdiction…. [and which provides] the legal linkage and basis for this Court's jurisdiction… separate and distinct from human right's violations."
In this regard, this Court reflecting on the *Katabazi case* – observed that:
"In [*Katabazi*], 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 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."
The Republic of Rwanda and EAC Treaty and other International Covenants

25. The Republic of Rwanda is a Community member and a signatory to the EAC Treaty. It is also a signatory to the African Charter on Human and People's Rights. On 9th July 2010 it ratified the African Charter on Democracy, Elections and Governance and deposited the Instrument of Ratification on 14th July 2010. By the latter Charter State Parties who subscribe to it are obligated by Article 3 as follows:-
"State Parties shall implement this Charter in accordance with the following principle:-
(i) Respect for human rights and democratic principles".
Similarly, Article 4 of Chapter 4 of that Charter states as follows:- "Democracy, Rule of Law and Human Rights
(ii) State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights."
26. It is manifestly plain from a reading of Article 6 (d) that the EAC Treaty was promulgated with a specific aim, namely, to foster the Rule of Law. Also, the EAC Treaty clearly enjoins a Partner State to govern its people in accordance with the principles of good governance, including adherence to the principles of democracy, the rule of law, protection of human and people's rights in accordance with the African Charter on Human and People's Rights. Article 6 of that Treaty, mandates each State Party to guarantee individual's liberty; and not to deprive its subjects of their freedom except for reasons laid down by law. In particular, none may be arrested or detained arbitrarily.
27. To this end this Court definitively affirmed in the *Independent Medical Legal Unit case (supra)* that:
"The respective Partner States' responsibilities to their citizens and residents have, through those States' voluntary entry into the EAC Treaty, been scripted, transformed and fossilized 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 of the Treaty 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 violation of human rights under the Constitutions and other Laws of [the Partner State] or of the international Community, that is the cause of action in the Reference at hand."

**Evaluation of the Evidence**

28. It is not in dispute that the subject was held in custody without lawful authority from 20th August 2010 until 28th January, 2011. In his affidavit sworn on 16th June 2011, the Attorney General of the Republic of Rwanda deponed, *inter alia*:-
"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, the Military High Court ruled on his preventive detention, applying article 89 of the Rwandan Code of Criminal Procedure, 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 in effect the mischief in relation to the irregular detention was cured by the decision of the Military High Court when it regularised the pre-trial detention. Consequently, the detention of Lieutenant Colonel Rugigana Ngabo is regular and in accordance with the Laws of Rwanda.

That for the purposes of investigation 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 Code of Criminal Procedure, 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 Rwanda Criminal Code."

29. To hold a citizen in preventive detention without lawful authority and in breach of the laws of the State of Rwanda; to deprive him of his liberty for a period of about five (5) months; not to inform him or his family of the reason(s) for detention, obviously breach the principles set out in the EAC Treaty to which the Republic of Rwanda is a signatory.
30. We are satisfied that the Appellant gave no information at all about why, where and how it was detaining the subject. Of particular importance in this appeal is the fact that there was no evidence at all that the subject was informed of the reason for his detention, neither was the family informed. The Appellant, furthermore, did not even issue a Gazette notice, nor any official communication regarding the detention.
31. Though the arrest of the subject on suspicion of having committed a crime known to the Laws of the Republic of Rwanda would not, by itself, breach the EAC Treaty or other international human rights covenants and instruments, however, the detention beyond the time permitted by law, does amount to a breach.
32. Moreover, the action taken against the subject by the Appellant in holding him incommunicado and in ignorance of the charges was, in all respects, not transparent; and offends the Principles of Articles 6 (d) and 7 (2) of the EAC Treaty.

**Exhaustion of Local Remedies**

33. It was vigorously argued by the Appellant before us that the subject should have exhausted local remedies before filing the reference in this Court and that this was a requirement of customary international law. This submission in our view is now moot since it was agreed by both parties before the Court below that upon the Reference being filed; the Republic of Rwanda produced the subject before the Military High Court of that country.
34. Furthermore, the Respondent did not challenge the rule which requires that international judicial proceedings may only be instituted following the exhaustion of local remedies. Rather, she contended that the present case is one in which an exception to the rule may be invoked due to the peculiar facts of the case; and again, the case being one in which an exception to the rule is authorized by the rule itself, since the First Instance Division found it as a fact that it was not possible, in

the circumstances, to tell the subject to go back to Rwanda and exhaust whatever remedies, if any, were available there.

35. The obligation to exhaust domestic remedies forms part of customary international law, recognized as such in the case law of the International Court of Justice. See *The International Case (Switzerland v United States)* judgment of 21st March 1959. It is also to be found in other international human rights treaties, for example, the International Covenant on Civil and Political Rights (Article 4 9(1) (c) and the Optional Protocol (Articles 2 and 5 thereto and the African Charter on Human and Peoples' Rights (Article 46). However, the EAC Treaty does not have any express provisions requiring exhaustion of local remedies. In our view, therefore, though the Court could be flexible and purposeful in the interpretation of the principle of the local remedy rule, it must be careful not to distort the express intent of the EAC Treaty. In the instant case, in any event, given the peculiar circumstances of this particular case it is difficult if, not impossible, to see what local remedies remained to be exhausted – in view of the State's own express admission and concession to the effect that the five-month detention in question:

"was irregular and contravened the provisions of Articles 90 to 100 of the Rwanda Code of Civil Procedure…

That in effect, the mischief in relation to the irregular detention was [only] regularized by the decision of the Military High Court when it regularized the pre-trial detention".

-See the above - quoted affidavit of the Hon. The Attorney General of the Republic of Rwanda, dated 16th June, 2011.

When did time begin to run?

36. It was further averred by the Appellant that the Reference was filed out of time and ought not to have been entertained by the Court below. In our view, it was not possible with any degree of certainty to determine when time begun to run. The pleadings do not tell us. Furthermore, the affidavits of the subject's sister and wife are merely hearsay in that they only depone that "they were told" of the detention. We think that the sister and wife should not be penalised for not knowing when the subject was detained. After all, there is sufficient evidence on record to sustain the contention that the Government of Rwanda was largely to blame for withholding information on the detention of the subject.

37. It is obvious that the Respondent could not file any Reference in this Court concerning the arrest of her brother, unless and until she had knowledge of the detention - namely: when, where, why, and by whom the brother had been detained. The Respondent averred knowledge only of her brother having gone missing. She did not know if he had been arrested – if so, by whom, and for what reason, purpose of offence; nor, indeed, where he was being kept, and by whom. The Appellant, on the other hand, contended that the Respondent knew all these; and that she did so right from the day of the arrest of her brother (i.e. 20 August 2010). It is our view that, in these circumstances, it is the Appellant who had the burden to show when the sister and the wife of the subject knew the date the subject was detained. To contend that they should have known of the detention through such foreign media as the BBC is, with great respect, untenable since these are not State or Official organs for informing the citizens of Rwanda about the official affairs of the State – and, particularly so,

regarding information touching the security affairs of the State.

38. We are satisfied that the Appellant failed to discharge the burden of showing the Respondent's knowledge of the critical date; and as the principle – "he who alleges must prove" – not having been satisfied, the benefit of the doubt must go to the Respondent.

**Conclusion**

39. In light of the above considerations and findings, the appeal fails on all five grounds. Accordingly, the Court holds as follows:
    (1) The judgment of the First Instance Division is upheld, but for the different reasons discussed above.
    (2) The Court has jurisdiction to interpret and apply the provisions of the EAC Treaty, including Articles 6 (d), 7 (2) and 8 (1) (c) of that Treaty.
    (3) The failure by the appropriate Authorities of the Republic of Rwanda:
        (a ) To produce Lt. Col. Seveline Rugigana Ngabo before a competent Court of law beyond the forty eight (48) hours prescribed under Rwandan Laws; and
        (b) To charge him with specific offences for his arrest and detention, as well as to inform him, his family or his lawyers of the time of his arrest/detention--for a period of five (5) months, during which time he was held incommunicado--was fundamentally inconsistent with Rwanda's express undertakings under Articles 6 (d), 7 (2) and 8 (1) of the Treaty: to observe the principles of Good Governance, including in particular, the principles of adherence to the Rule of Law, and the promotion and protection of human rights. These failures, singly and collectively, constituted an infringement of the said provisions of the Treaty.
    (4) Unlike other legal regimes in this field, the EAC Treaty provides no requirement for exhaustion of local remedies as a condition for accessing the East African Court of Justice.
    (5) In the circumstances of this particular case, the onus was on the Appellant to establish the time at which the detainee or his family members or his lawyers were told or otherwise made aware of the detention of Lt. Col. Ngabo. The Appellant failed to discharge that burden. He cannot now turn around to impeach the Respondent for any failure to file the Reference within the two (2) months prescribed under Article 30 (2) of the Treaty.

The Appellant shall bear the Respondent's costs of this appeal and of the Reference in the First Instance Division.

It is so ordered.

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East African Court of Justice - Appellate Division

Appeal No. 2 of 2012
Appeal from the Ruling of the First Instance Division in Application Nº. 4 of 2011 by: J. Busingye, PJ; J. J. Mkwawa, and J. B. Butasi, JJ, on 1st December 2011,

Arising out of Application No 4 of 2011 in Reference No. 4 of 2011

**Attorney General of the Republic of Uganda & Attorney General of the Republic of Kenya (As Interested Party) And Omar Awadh and 6 others**

Before: Tunoi, VP; E. R. Kayitesi, and J. M. Ogoola, JJA
April 15, 2013

*Continuing violation - Unlawful Detention- Legal certainty- Limitation of time- Time started to run from the date of arrest and detention- Whether the First Instance Division erred in law in computing time.*

*Articles: 23 (3) 30 (2)and 35A of the Treaty establishing the East African Community- Rule 99 of the East African Court of Justice Rules, 2010 –*

The Applicants / Respondents in Reference No 4 of 2011 claim that they were arrested, and forcibly removed from Kenya between 22nd July and 17th September 2010, and handed over to officials of the Government of Uganda who illegally detained them without due process of extradition. They claimed that their impending trial in Uganda was in violation of their fundamental rights, under both the Kenyan and Ugandan Constitutions, International law, and the Treaty establishing the East African Community. Through Application No 4 of 2011, they sought to *inter-alia* to restrain the Government of Uganda /the Appellant from proceeding with the prosecution.

The Attorney General of Uganda / the Appellant raised a preliminary objection contending that the Reference was filed out of time. On 1st December 2011, the First Instance Division concluded that the Treaty violations complained of in the Reference, were continuous; could not be subjected to mathematical computation of time; and that, therefore, the Reference was properly lodged. Aggrieved by the decision, the Attorney General of Uganda/Appellant lodged this appeal averring that the Reference No 4 of 2011 was time-barred.

**Held:**

1) The detention complained of followed a chain of events all of which can be very well located in time. The Applicants also readily admitted to having been aware of the acts complained of, as and when those acts were happening.
2) The starting date of an act complained of under Article 30 (2) is not the day the act ends, but the day it is first effected. Therefore the two months limitation period under Article 30(2) started to run from the day that the arrest and detention were effected.

3) There is nothing in the express language of Article 30 (2) that compels any conclusion that continuing violations are to be exempted from the two month limit. Nor does the nature of the particular violation alleged in the instant case demonstrate any intent on the part of the drafters of the Treaty to treat unlawful arrest and rendition as continuous violations for purposes of the time limit of Article 30 (2).
4) By filing the Reference more than one year after the happening of the events complained of, the cause of action was time-barred for non-compliance with Article 30 (2) of the Treaty.

Cases cited:
Assi Doman Kraft Products and Others Commission, Case T-227/95 [1197] ECR II-1185
Collotti v Court of Justice [1965] ECR
Dogett v US, 505 US, 647, 665-66 (1992)
Ferriera Valsabbia Spa v EC Commission, Case 209/83, OJ C2009, 9.8.84 p.6,
Joyce Nakacwa v Attorney General and Others; Constitutional Petition No. 2 of 2001 [2020] UGCC1
State v Ganier, 227 Kan.670, 672 (1980)
The Attorney General of the Republic of Rwanda v Plaxeda Rugumba, EACJ Appeal No. 1 of 2012 (distinguished)
Toussie v United States 397 US 112 (1970)

**Judgment**

**Factual Background**

1. The Appeal before this Court has its origin in Application No. 4 of 2011 arising from Reference No. 4 of 2011 lodged in the First Instance Division on 15th June 2011. The facts that gave rise to this Reference, happened in both Kenya and Uganda.
2. The Applicants in the above Reference averred that they were arrested, and forcibly removed from Kenya through abduction between 22nd July and 17th September 2010, and handed over to Uganda where they are now illegally detained, without due process of extradition; and that their impending trial in Uganda is in violation of their fundamental rights, both under Kenyan and Ugandan Constitutions, under International law, and also under the Treaty establishing the East African Community ("the Treaty"). It is against those acts that the Applicants (Omar Awadh, Hussein Hassan Agade, Idris Mogandu, Mohamed Hamid Suleiman, Yahya Suleiman Mbuthia, Habib Suleiman Njoroge) moved the First Instance Division of this Court for orders that:
    a) "This motion…… before this Court……be lodged without payment of fees and the fee in connection with the said Reference be waived and/or refunded as the case may be.
    b) Due to the nature and urgency of this Application, and to avoid irreparable injustice this Honourable Court be pleased to prohibit, restrain and injunct the Government of Uganda (the Second Respondent herein) ……., from proceeding with the prosecution and/ or trial of the Applicants pending the hearing and the determination of Reference No. 4 of 2011 before this Honorable Court.

c) 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.

d) The costs of and incidental to this Application abide the result of Reference No.4 of 2011 lodged with this Honorable Court".

3. At the hearing of the matter, the Applicants dropped prayers (c) and (d), and maintained prayers (a) and (b) relating to fees and injunction, respectively.
4. However, in opposition to the Application, the Second Respondent (Attorney General of Uganda) raised a preliminary objection on limitation of time. He contended that the Reference on which this Application is based is itself out of time, consequently the Application is time barred. The First Instance Division on 1st December 2011, concluded that the alleged Treaty violations complained of in the Reference, were continuous; could not be subjected to mathematical computation of time; and that, therefore, the Reference was properly lodged before it. Accordingly, that Court disallowed the objection.
5. Aggrieved by the above decision, the Appellant (Attorney General of Uganda) lodged an appeal to this Appellate Division on 17th February 2012, based on only one ground of appeal as framed in the Memorandum of Appeal, namely: "that the First Instance Division erred in law in finding that Reference No. 4 of 2011 was not time barred and was properly before the Court".
6. The Appellate Division of this Court is mandated under Articles 23 (3) and 35A of the Treaty and Rule 99 of the East African Court of Justice Rules of Procedure, to hear and dispose of this appeal.
7. During the Scheduling Conference, Learned Counsel for both Parties decided to adopt all their original arguments set forth in their written submissions that were filed in the lower Court; and would only highlight them during the hearing.
8. Mr. Ngugi, Learned Counsel for the Attorney-General of Kenya as an interested party, associated himself with the Appellant's prayers that this Court ought to reverse the decision of the First Instance Division.
9. Mr. Mureithi, Counsel for the Respondents, informed the Court that the Third Respondent, Mr. Mohamed Adan Abdul was released from Uganda in November 2011 and was, therefore, no longer interested in this appeal.

**Appellant's Submissions**

10. The Appellant relied on the one ground of appeal, namely that the Learned Judges of the First Instance Division erred in law in finding that the Reference No. 4 of 2011 was not time barred. Specifically, the Appellant contended that the Application was time-barred because the Reference on which it is based was itself filed in Court out of the time limit prescribed by Article 30 (2) of the Treaty. The Appellant explained that while the acts complained of in that Reference (including the arrest, rendition and detention of the Respondents), happened between 22nd July and 17th September 2010, the Applicants had filed their Reference only on 9th June 2011, vastly in excess of two months after they, and persons claiming under them, became aware of the alleged infringement.
11. The Appellant submitted that while the Court did not challenge this evidence, it

nevertheless overruled the preliminary objection. In doing so, the Court held that it was alive to the strict limitations of Article 30 (2); but that the acts complained of were continuous, not capable of mathematical computation of time and, therefore, they could not be subjected to the time-limit of Article 30 (2) of the Treaty.

12. The Appellant contended, in particular, that their Lordships' interpretation that Article 30(2) does not apply to the continuing violations, in effect disregards the time limit stipulated by that Article. Such an interpretation is an error of law because it ignores and negates the ordinary meaning of Article 30(2).
13. The Appellant further contended that the Court had no inherent power to give an interpretation which does not give effect to the Treaty; or which invalidates a Treaty provision. Furthermore, by invalidating the time limit, the Court acted in violation of Article 9(4) of the Treaty, which binds it as an Organ of the East African Community to give effect to the provisions of the Treaty.
14. The Appellant highlighted the point that the effect of their Lordships' interpretation of Article 30 (2) is that regardless of a claimant's knowledge of an infringement, he remains at liberty to bring an action at any time as long as the infringing situation continues. Actions would thus arise at the discretion of a claimant regardless of the time lapse from when the infringement first occurred or when he first became aware of it. Such an interpretation is erroneous. It invalidates the ordinary meaning of Article 30(2).
15. Lastly, the Appellant raised the issue of their Lordships' reliance on their own decision in *Reference No.3/2010: Independent Medico Legal Unit v Attorney General of the Republic of Kenya*. That decision has since been overturned by the Appellate Division of the Court in Appeal No.1/2011: *Attorney General of the Republic of Kenya v Independent Medico Legal Unit*. The Appellate Division rejected the concept of continuing violations; and opted, instead, for the strict interpretation of Article 30 (2), with emphasis on upholding and protecting the principle of legal certainty.
16. In sum, the Appellant avers that the Court has a duty to interpret the East African Community Treaty according to its ordinary meaning, and that the ordinary meaning of Article 30 (2) of that Treaty is that a claimant is required to file his Reference within two months of the act or after the offending act comes to the claimant's knowledge.
17. The learned Counsel for the interested party associated himself with the Appellant's submissions. He emphasized the interpretation of Article 30 (2) and its applicability to the facts of the instant case. He underscored to the Court the fact that a reading of Article 31 (1) of the Vienna Convention requires fora such as this Court, when interpreting a Treaty to do so 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 objects and purpose. Moreover, Article 9 (4) of the East African Community Treaty places temporal limits within which all organs and institutions of the Community, including this Court, are under a duty: "to perform the functions and act within the limits of the powers conferred upon them by or under this Treaty".
18. He contended that the First Instance Division, in its interpretation of Article 30 (2), erred in its decision that the Article provides for a concept of "continuing violations". Article 30 (2) 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. Indeed, the jurisprudence of the Appellate Division of this Court has put an end to that dispute: the said Article in letter and in spirit, does not conceive of any concept of continuing act(s) or violation(s).

**Respondents' Submissions**

19. In response, the Respondents focused on two points: First, whether the Treaty provides room for the concept of continuing violations? Second, whether Article 30 (2) must be given a strict interpretation; including whether the Court has power to extend the time limit provided in that Article 30 (2)? On all these, the Respondents emphasized the applicability of the principle of continuing violations; and the doctrines of the interpretation of the Treaty as a whole, and in good faith.
20. The Respondents opposed the Appeal, contending that the Reference was not time barred because the infringements inflicted on them are still ongoing. They explained that their arrest and rendition without due process of extradition, were clearly unlawful; given the illegality of a rendition in abuse of process. Accordingly, the subsequent detention and all that followed, are likewise illegal, because the origin of the whole process was illegal. Consequently, the current detention of the Respondents, based on those illegalities, is equally unlawful. As the detention is still ongoing, it has inevitably become a continuing violation.
21. The Respondents asserted that a Reference or an Application cannot be lodged in the Court until this illegal situation ends. They emphasized that this is the position in the European Commission of Human Rights, in the Inter-American Court, and in the African Human Rights Commission.
22. They based their above assertion on the various jurisprudence of those Judicial Bodies which have permitted exceptions to the six month limit on instituting claims, and have legitimized the principle of continuing violations. They added that the African Human Rights Commission has gone so far as to distinguish between "instantaneous"` acts and "continuing" violations.
23. The Respondents considered that as long as their detention continues, the " two month limit" to institute proceedings as provided for by the Treaty, could not run against them. They prayed that the Court, under the first limb of Article 30 (2), hold that the actions complained of are still extant and, therefore, time has not even started to run. Therefore, the Court should make an exception to the time limit, and conclude that this is the interpretation to be given to Article 30 (2) for cases of continuing detention. Such interpretation would help to avoid the impunity of the continuing violations of the rights of accused persons.
24. The Respondents concurred with the Court that nowhere in the EAC Treaty, nor in the corpus of its related instruments, is the term "continuing violation", or "continuing breach" to be found. Notably, the term is also not found in any of the constitutive instruments of the African, European or Inter-American Systems. Nonetheless, they submitted that, despite this, and as is evidenced in the above jurisprudence, judicial and quasi-judicial bodies have defined, interpreted and continue to enforce the principle of continuing violations.

**Decision of the Court:**

25. After considering arguments from both parties, the First Instance Division made a ruling that the Reference was not time barred. The ruling and order of the First Instance Division were based on the reasoning that the alleged violation was a "continuous act which cannot be subjected to mathematical computation of time".
26. The Appellate Division of this Court has carefully considered the rival submissions of the Parties in support of their respective positions. First and foremost, we find (supported by the Parties' own affirmation), that the acts complained of (such as the arrest, rendition and detention of the Respondents) happened between 22nd July and 17th September 2010; and that those acts were well known by the Applicants/ Respondents, right from the inception of the various acts.
27. In the above regard, it is plainly evident that both parties have no dispute concerning the fact that the Applicants promptly filed their legal challenges on behalf of their relatives (the Respondents) in the domestic Courts – namely, the High Court of Kenya and of Uganda, seeking their release. Later on, they lodged their Reference in this Court, in June 2011. This was more than one year after the expiry of the two-month time limit prescribed by the Treaty.
28. This Court finds that there can be no disputation on the computation of time. This is so because the Applicants readily admitted to having been aware of the acts complained of, as and when those acts were happening – as evidenced, in any event, by the prompt lodging of their complaints in the national courts of Kenya and Uganda. That being the case, this Court must conclude that the Reference, having been filed in this Court more than one year after the happening of the events complained of, was time-barred for non-compliance with Article 30 (2) of the Treaty. Consequently, the applicability of the second limb of that Article is not relevant to the circumstances complained of in the instant Reference.
29. However, the position is vastly different as regards the application of the first limb of Article 30 (2). The Applicants/Respondents met a formidable challenge on the applicability of that particular limb to their complaint concerning "the detention of the Respondents".

**Interpretation of Article 30 (2) of the Treaty:**

30. Article 30 (2) 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"`
31. In interpreting Article 30 (2) in the *Independent Medico case (supra)*, this Court held that: ``The Treaty does not contain any provision enabling the Court to disregard the time limit of two months and that Article 30 (2) 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.``
32. We find the submissions of the Respondents to be ingenious in respect of the interpretation of Article 30 (2). Mr. Mureithi, for the Respondents, contended that Article 30 (2) contains two considerations as to when time begins to run. Under the first limb of the provision, time begins to run within two months of the action complained of. Under the second limb, time begins when the party coming before the

Court had knowledge of the action complained of.

33. While it seems easy to apply and interpret the first limb of the provision, it might not be as straight forward to apply or interpret its second limb, which starts with the phrase "in the absence thereof". Indeed, it is quite evident that the second limb comes into play only where the first limb cannot apply. However, it is not clear as to what should be absent. Is it the enactment, publication, directive, decision or action complained of? Or is it the date of such enactment, publication, directive, decision or action? To any reasonable mind, the first question can only be answered in the negative, since one cannot complain against something that does not exist. We are convinced that by the phrase "in the absence thereof", the drafters of the Treaty meant "in the absence of any known date thereof".
34. The second limb would then apply where the claimant does not know the exact date of the action complained of. For instance in the case of *The Attorney General of the Republic of Rwanda v Plaxeda Rugumba, Appeal No. 1 of 2012*, decided by this Court on 22nd June 2012, the action complained of was the incommunicado detention of the Complainant. The detainee's sister who filed the complaint in Court, did not and could not know of the date of her brother`s detention. But that is not the same situation in this instant case of Omar Awadh.
35. In the circumstances of the instant Appeal, the Court must determine the specific actions complained of. In this regard, the Respondents indicated that the dominant action complained of was the detention. They also alleged other wrongful actions, such as their arrest and rendition. Nonetheless, they conceded that all those were "instantaneous actions", meaning that they are capable of being time barred – unlike detention which is "continuous". For the purposes of this Appeal, therefore, detention is the action which the Respondents aver cannot be time-barred (on account of its being a "continuous violation").
36. The Court finds that the detention complained of followed a chain of events – all of which can be very well located in time. Applying Article 30 (2) and following the approach described above would establish whether the first limb of the provision applies to the detention complained of — which detention is allegedly still ongoing. We should count the two months commencing from the day when the detention started. The Respondents, on the other hand, contended that the time limit should start to run when the detention ceases. In our considered view that contention would not fit with what the first limb of Article 30 (2) dictates — namely, that:
"The proceedings provided for in this Article shall be instituted within two months of the … action complained of"
37. The "action" in the instant case was the detention. That detention was effected and started on the same date of the arrest and rendition of the Respondents. Accordingly, it is clear that the two months started to run from the day that the arrest/rendition/ and detention were effected; and the resultant cause of action before this Court is clearly time -barred. This is the proper interpretation to be given to the first limb of Article 30 (2), in accordance with the ordinary meaning given to its terms and in their context — as stipulated by Article 31 (1) of the Vienna Convention. We should emphasize that the cause of action for the Reference now before this Court is not the alleged unlawful detention of the Respondents in Uganda, nor indeed their arrest

and rendition from Kenya to Uganda — which are a matter of criminal law. Rather, it is the alleged infringement of the EAC Treaty by the Partner States of Kenya and Uganda – which is a matter of civil law.

38. The Appellant contended that the two-month limit starts running from the date the Respondents became aware of their detention. But that contention is tantamount to jumping to the second limb of Article 30 (2) which, as we have indicated earlier, comes into play only where the first limb cannot apply. Indeed, in this Court's view, the second limb is a defence for he who alleges that he did not know the date of the enactment, publication, directive, decision or action. He may come to Court years after the enactment, publication, directive, decision or action to prove to the Court that indeed he had no such knowledge. In that event, the Court would compute the two months from the date that person acquired such knowledge.

**Unlawful Detention**

39. The Court noted the Respondents' express admission that the victims are currently before the competent courts of Uganda, having been committed to that Country`s High Court, where judicial procedures are ongoing. Specifically, the Respondents/ Applicants in their written submissions of 10th August 2011(at p. 6) lodged before the First Instance Division, stated as follows:

4. That the Uganda Government has already filed charges against the Applicants and intends to try them in Uganda for alleged murder, terrorism and suicide attacks;
5. That although already charged with various offences, the trial of the Applicants in Uganda has not commenced but is expected to commence any time"

40. Notwithstanding the above, the Respondents contend that their current detention in Uganda is unlawful because, it is based on an arrest and a rendition that were unlawful ab initio (from the beginning). They aver, therefore, that the resulting detention is equally unlawful and as such a continuing violation; and that, in these circumstances, computation of the time limit will not be possible, until the cessation of their continuing detention. It is quite evident, therefore, that what is construed as "continuing violations" derives from an interpretation of the first limb of the Article 30 (2) to determine when an act complained of begins and ends.
41. First, this Appellate Division of the Court has a duty to put an end to the confusion surrounding the legal analysis of the detention of the Applicants/Respondents. According to the Constitution of Uganda, as we read it, this kind of detention is "unlawful" when a person arrested is kept in custody beyond the prescribed time of 48 hours, without being produced before a competent court of law and charged with a crime. The continued detention of a suspect who has already been produced before a court and charged with an offence, is quite a different matter altogether.
42. It is erroneous to refer to the current situation of the Respondents as unlawful detention. This is for two reasons: first, the Respondents went before the courts of Kenya upon their arrest; and right now, they are currently before the competent courts in Uganda duly charged and awaiting trial. Second, it is for the courts of law, not anyone else, to judge whether or not a detention is unlawful. Lastly, the illegality of the Respondents' detention cannot be determined by the alleged abuse of process in effecting their arrest and rendition.

43. We note in particular, that both the arrest and the rendition were proximate. Both happened simultaneously, virtually on the same date(s) — dates of which the respective Respondents were fully aware: a fact which the Respondents have not and cannot deny or contest. On the contrary, they have conceded as much. It was precisely because of this knowledge that the Respondents had their matters brought promptly to the Kenyan courts (and subsequently to the Ugandan courts). Alas, later the same Respondents came to this Court to file their complaint, but too late: approximately one year after the expiry of the time limit of two months prescribed in Article 30 (2) of the Treaty.
44. In the instant case, both parties including the Court itself recognize that the Respondents were arrested in one country and rendered to another without the intervening process of extradition. But whether this was unlawful and whether any such unlawfulness has affected or tainted the Respondents' initial and even current detention, are matters to be decided by the courts, including this Court, on the merit of the case. Cleary, under our law, such merits can only be gone into by this Court if the Respondents are able to surmount the preliminary but formidable hurdle of the time ¬bar that is prescribed by Article 30 (2).

    Detention as a continuing violation and the principle of legal certainty in light of the meaning of Article 30 (2).
45. The Court finds also that the situation of the Respondents in the instant case is quite different from the situation of the *Plaxeda Rugumba case (supra)*. In the *Rugumba case*, all that the Appellant needed to prove was the date the Applicant became aware of the action. The Appellant had raised a preliminary objection to the effect that the Reference was time barred. The Applicant argued that he did not know the date his client had been arrested and detained; and the Respondent failed to prove that the Applicant knew that date. We held that, in that case, the first limb of Article 30 (2) could not apply; and stated that:

    "In our view, it was not possible with any degree of certainty to determine when time begun to run. The pleadings do not tell us. Furthermore, the affidavits of the subject's sister and wife are merely hearsay in that they only depone that "they were told" of the detention. …… the onus was on the Appellant to establish the time at which the detainee or his family members or his lawyers were told or otherwise made aware of the detention of Lt. Col. Ngabo. The Appellant failed to discharge that burden. He cannot turn around to impeach the Respondent for any failure to file the Reference within the two (2) months prescribed under Article 30 (2) of the Treaty."
46. In deciding that case as we did, this Court could not pinpoint the date on which the Applicant had knowledge of the time Rugumba was arrested. The Appellant himself was not able to provide the Court with any clear and tangible evidence of when the Applicant, or Rugumba' s family members became aware of Lt. Col. Ngabo's detention as a starting point for computing the time limit of Article 30 (2).
47. However, we note that in the instant case, the Appellant based his argument on the principle of legal certainty. The principle is reflected in this Court's recent decision in the *Independent Medico case (supra)*, in which the Court stood firm and clear on the principle of legal certainty; and gave the following interpretation of Article 30 (2):

    "Again, no such intention [to extend the time limit] can be ascertained from the

ordinary and plain meaning of the said Article [30 (2)] or any other provision of the Treaty. 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.

48. The Court is still of the same view: that the objective of Article 30 (2) is legal certainty. It still notes that the purpose of this amended provision of the Treaty was to secure and uphold the principle of legal certainty; which requires a complainant to lodge a Reference in the East African Court of Justice within the relatively brief time of only two months. Nowhere does the Treaty provide for any "`exception"` to the two month period. Therein lies the critical difference between the EAC Treaty (which governs trade matters as the objective of cooperation between Partner States) on the one hand; and, on the other hand, Human Rights Conventions and Treaties which provide "exceptions" (for continuing violations) on the grounds that securing the fundamental rights of the citizens is of paramount essence. For this reason, the Judicial Bodies that have Human Rights jurisdiction must strenuously uphold and protect all such rights through a liberal and purposive interpretation.
49. As regards the instant case, however, there is nothing in the express language of Article 30 (2) that compels any conclusion that continuing violations are to be exempted from the two month limit. Nor does the nature of the particular violation alleged in the instant case demonstrate any intent on the part of the drafters of the Treaty to treat unlawful arrest and rendition as "continuous violations" for purposes of the time limit of Article 30 (2) – see the two part test (for determining "continuing offenses") set by the USA Supreme Court case of *Toussie v United States 397 US 112 (1970)*: namely, (a) if the explicit language of the statute compels such a conclusion; and (b) if the nature of the crime is such that Congress must assuredly have intended that it be treated as a continuing one.
50. It is clear that both the content and intent of Article 30 (2) provide a legal framework for determining the starting date of an act complained of, or alternatively the date on which the complainant first acquired the requisite knowledge — all with the objective of ascertaining the commencement and expiry of "the time limit of two months". In that spirit, the Article does not contemplate the concept of "continuing" breach or violation, in as much as the acts complained of, or the time when a claimant had knowledge of the breach or infringement, have a definitive starting date and expiry date within the two -month period. The only "continuing" period envisaged under the Article is the grace period (implicitly allowed in the second limb of that Article) for the complainant to have knowledge of the act. From the date of such knowledge, the legal clock for the two-month period starts to tick.
51. Furthermore, in respect of the principle of legal certainty, the Court must underscore the necessity for strict application of the two-month limitation period of Article 30 (2). To contend, as the Respondents do, that complainants should wait (possibly for years and years) until the end of a "continuing breach" before lodging their complaint in this Court, is to militate against the very spirit and grain of the principle of legal certainty. True, the complainant has an interest, a personal interest, in prosecuting his case against the particular breach. But so too do all the other citizens of the East

African Community, its organizations, institutions, and Government entities of the Partner States – whose collective interest is in ensuring legal certainty in the efficient and effective operation of the affairs of the Community throughout all the territories of the Partner States.

52. The solution that was designed to balance the interest of the individual complainant against the collective interests of all the other Community citizens, is the overall framework of Article 30 – in which the collective interest of legal certainty is secured under Article 30 (2), but without compromising the individual complainant's right to judicial redress (if promptly lodged within two months under Article 30 (2), including the grace period afforded the complainant to acquire knowledge of the particular act). That grace period can be as long as it takes for the complainant to be possessed of the requisite knowledge. Only after the complainant has that knowledge, will the period of the two-month limitation begin to run. That, in this Court`s view is a perfectly fair, equitable and rational solution to balance the competing interests. We find nothing arbitrary, capricious, or unreasonable concerning this comprehensive solution of Article 30 – especially so in a Treaty which governs not Human Rights matters, but Trade and Social interests within and between the Partner States. In this regard, it is necessary to emphasize that the Court does not, as yet, have the substantive Human Rights jurisdiction envisaged under Article 27 (2) of the Treaty. Nonetheless, as this Court has consistently held, 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 case of *Katabazi and 21 Others v EAC Secretary General and Attorney General of Uganda, Reference No. 1 of 2007.*
53. Indeed, this Court is not alone in strictly applying the legal certainty principle. We are fortified in this regard by the rich history and rationale of the European Court (the prototype, after which our Court was modeled) concerning the brevity and strict application of the two-month limitation rule. The European Court applies the short limitation period strictly, precisely because of the rationale of legal certainty -see for instance, that Court`s judgment of 14 September 1999, on appeal by the *Commission of the European Communities: Appellant v. Assi Doman Kraft AB, Iggesunds Bruk AB, Korsnas AB MoDo Paper AB; and on appeal against the Judgment of the Court of First Instance of European Communities (2nd Chamber) of July 1997 in Case T-227/95 Assi Doman Kraft Products and Others Commission [1197] ECR II-1185*, seeking to have that judgment set aside. The Court held……in paragraphs 57, 60, 61 that:
"It is settled case-law that a decision which has not been challenged by the addressee within the time-limit laid down by Article 173 of the Treaty becomes definitive as against him (see, in particular, the Judgment in case 20/65 *Collotti v Court of Justice [1965] ECR* and the Judgment in TWD Textilwerke Deggendorf."
54. In that case of *TWD Textilwerke Deggendorf (supra)* – the rationale was elaborated at length as follows: "The court held that Article 173 of the Treaty precluded the recipient of state aid who could have challenged the Commission decision declaring the aid unlawful and incompatible with the Common Market by bringing an action for annulment within the time-limit laid down in the fifth paragraph of Article 173 of the Treaty and who did not bring such an action from challenging before the national court the measures implementing the Commission decision by seeking to rely on the

illegality of that decision. A ruling to the opposite effect would give such a party the power to overcome the definitive nature which the decision has in relation to him once the time-limit for bringing legal proceedings has expired.

Such a rule is based in particular on the consideration that the purpose of giving time-limits for bringing legal proceedings is to ensure certainty by preventing Community measures which produce legal effects from being called in question indefinitely as well as on the requirements of good administration of justice and procedural economy".

55. The Respondents laboured valiantly to avail to us all the abundant jurisprudence of the European Human Rights Court, the Inter-American Court, the African Commission and others, that recognize the principle of "`continuing violations"`. While this jurisprudence is perfect for its particular circumstances, it is all about Human Rights violations, governed by particular Conventions on Human Rights. Furthermore, the background to that jurisprudence concerns criminal matters, whose prosecution does not in, most cases, have a prescription of time limit. In the instant case, the Respondents` cause of action was clearly the alleged infringement of Partner States' Treaty obligations – a matter which lies outside the province of human rights and the realm of criminal law.
56. We note that even the applicability of the continuing offense doctrine, as a criminal law concept, requires extreme judicial circumspection. The doctrine is usually advanced by the Prosecution to avoid the running of the statute of limitations – see *the United States of America case of State v Ganier, 227 Kan.670, 672 (1980)*. In this regard, the USA Supreme Court did, by this doctrine, create an exception to the general limitations rule by carving out the continuing offense doctrine – namely, that the statute of limitations for continuing offenses begins to run not when the elements of the offense are first met, but when the offense terminates – see the Supreme Court`s seminal decision of *Toussie v the United States 397 US, at 115 (1970)*. Nonetheless, in that very same hallmark decision (at p.115), the Supreme Court recognized the "inherent tension between the continuing offense doctrine and the statutes of limitations". It, therefore, directed that the continuing offense doctrine "be applied sparingly". In his penetrating article: *Easing The Tension Between Statutes of Limitations And The Continuing Offense Doctrine, 7 NW. J.L. and Soc. Policy, 219 at p.222 (2012)*, http://scholarlycommons.law.northwestern.edu/nj/sp/vol7/iss2/1, Jeffrey R. Boles categorically and emphatically states that:

"the [continuing offenses] doctrine is disfavored by the Supreme Court and should be applied only in rare circumstances……it circumvents the protections to dependants afforded by the statutes of limitations … it is part of a larger shift towards retributivism [ie proportionate punishment]…. [is] disruptive… [and needs] reforming and restoring order in this problematic area of jurisprudence".`

57. As regards the doctrine of continuing violations as a civil (not criminal) concept, the principle of legal certainty, is equally upheld in the courts where issues of human rights are litigated. The courts have underscored the necessity, even in human rights litigation, for litigants in any society to canvass their rights promptly, at the earliest possible opportunity — thereby, to assure non-derogation of the accrued rights and relationships of other members of society. Hence, the generally applied principle of law and equity to the effect that: he who claims a right, must not (like Rip Van

Winkle) sleep or slumber on his right. An example of this philosophy is reflected in Uganda's Constitutional Court decision in J*oyce Nakacwa v Attorney General and Others*; Constitutional
Petition No. 2 of 2001 [2020] UGCC1" in which the Court made the following highly pertinent and perceptive statements:
"In view of the specified time limitation on other jurisdictions the Court is not in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind there can be no justification for the Petitioner`s delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases. I have carefully considered the case of *Dominic Arony* alluded to earlier in this judgment where my learned colleagues in a bench of three Judges awarded damages to the Applicant who came to Court to enforce his fundamental rights after about 20 years. With great respect, I wish to depart from their finding concerning limitation. In my view, a party who wishes to enforce his rights in court must do so within a reasonable time and must be prompt. In addition it would be in the interest of good public administration to adjudicate finally in such matters at the earliest time possible. The claim before me transcends nearly six (6) Parliaments and two political regimes or administrations. Granted that one of the possible reasons for not coming to court was fear of the then regime, surely such grave violations as alleged ought to have been instituted so as to test the regime, the courts and the pretence and the commitment of the then regime to adherence to democratic principles. In each phase of history it is a few brave people who have taken change to higher heights. The timid souls have had no place. Surely the applicants were soldiers and made of sterner stuff! If they sat on their rights for 24 years how would ordinary folks fair"?

58. Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of disruption of settled expectations, and reducing uncertainty about the future) — see Tyler t. Ocho and Andrew J. Wistrich'S article: *The Puzzling Purposes of Statutes of Limitations, 28 Pac. L.J. 453, 460 (1997)*, quoted in J*effrey R. Boles' article (supra)* at p.255, footnote 37. Time limits provide predictability both to the litigants and to society at large — see *Dogett v US, 505 US, 647, 665-66 (1992)*.

**Conclusion**

59. The Court finds the Respondents' argument that when the act complained of is a continuous detention, the starting date for computation of its limitation time is the day when it ceases is erroneous. It is erroneous in terms of the East African Community Treaty, and of the economic and social interests of the Community. Moreover, 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 (including for "continuing violations").

60. In light of all these considerations, the Court concludes (1) that the starting date of an act complained of under Article 30 (2) (including the detention of a complainant), is not the day the act ends, but the day it is first effected; (2) that the Respondents in the instant case filed their Reference out of the prescribed time; and (3) that, consequently, the underlying Reference to this appeal is time barred for not complying with the provisions of Article 30 (2) of the Treaty.

**In the result:**

1. This appeal is hereby allowed.
2. The Application arising from Reference No. 4 of 2011 lodged in the First Instance Division on 15th June 2011, is hereby struck out for having been filed outside the time limit prescribed under Article 30(2) of the EAC Treaty.
3. Each party shall bear its own costs of the appeal.

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East African Court of Justice – Appellate Division
Appeal No. 3 of 2012

An appeal from the Judgment of the First Instance Division by: Johnston Busingye PJ; Mary Stella Arach Amoko DPJ; John Mkwawa, Jean Bosco Butasi and Benjamin Patrick Kubo, JJ. Dated 30th November 2011 in Reference No.7 of 2010.

**Mary Ariviza & another And Attorney General of Kenya and the Secretary General of the East African Community**

Before: P. K. Tunoi VP; J.M. Ogoola and L. Nzosaba, JJA
November 8, 2013

*Appeals – Discretion to be exercised judiciously - Court cannot review the decisions of national courts - No concurrent jurisdiction between the two EACJ Divisions - Points of fact cannot be appealed- Whether the First Instance Division considering all the facts arriving at its decision.*

*Article 35A of the EAC Treaty – Rules: 77, 94 of the EACJ's Rules of Procedure, 2010.*

The Appellants/ Applicants were registered voters in the Republic of Kenya who filed Reference No 7 of 2010, alleging that the 1st Respondent had contravened the Referendum law in Kenya thus violating the rule of law and the EAC Treaty. The Appellants sought orders *inter alia* that: the promulgation of Kenya's New Constitution on 27th August, 2010 contravened the Treaty, 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.

Upon hearing the parties, the First Instance Division dismissed it stating that the decision of the decision of the Interim Independent Constitutional Dispute Resolution Court (IICDRC) complained of did not fall within the ambit of Article 30(1) and that the Court was not competent to review the decision of the IICRDC. Being dissatisfied with the Court's decision, the Appellants file this appeal.

**Held:**

1) Pursuant to Article 23 (3), facts are the exclusive preserve of that First Instance Division in its original jurisdiction. The Appellate Division has no concurrent jurisdiction in the area of facts. Only issues of law are justiciable before the Appellate Division.
2) In reaching its findings and conclusions, the First Instance Division exercised its discretion judiciously, not capriciously; and fairly, not unreasonably. Even if, those conclusions were wrong, they would not be reviewable by, nor appealable to, the Appellate Division. The First Instance Division was right in holding, that it had no jurisdiction to review the decisions of the Kenyan courts

3) The matter before this Court cannot be treated as an appeal of the electoral petition which formed the judicial process that took place in the Kenyan courts. The appeal was therefore dismissed.

**Cases cited:**
Alcon International Limited v Standard Chartered Bank of Uganda & Others. EACJ Appeal No. 2 of 2011
Attorney General of Kenya v Anyang' Nyong'o & 10 Others, Appeal No.1 of 2009
Mtikila v Attorney General of Tanzania, EACJ Reference No. 2 of 2007

**Judgment**

1. This is an appeal from the judgment of the First Instance Division dated 30th November, 2011 in Reference No. 7 of 2010. Initially, there were two Appellants to this appeal: Mary Ariviza and Okotch Mondoh. Subsequently, Miss. Ariviza chose to withdraw from the case. She wrote a letter to that effect; but despite this Court's prompting and assistance, Miss Ariviza neglected to complete the requirements of Rule 94 of this Court's Rules of Procedure – whereupon the Court was left with no option but to rule that Miss Ariviza had *abandoned* her appeal. Accordingly, her appeal was dismissed on 21st June, 2013 – leaving only the second Appellant: Mr. Okotch Mondoh, to continue with this appeal.
2. Out of the Appellants' many grounds of appeal, contained in the Memorandum of Appeal, the Parties mutually agreed the following two issues:
   (i) Whether the First Instance Division arrived at its decision without considering and /or appreciating the facts of the matter?
   (ii) Whether that Court misinterpreted Article 6 ( c) and (e) of the EAC Treaty?
3. In the course of hearing the appeal – and especially so, as regards the Parties' written submissions (which were "highlighted" during the oral proceedings) – it became quite evident that:
   (a) only the first issue above (i.e alleged non-consideration of facts), was the real bone of contention between the Parties;
   (b) the second issue ( i.e. alleged misinterpretation of the Treaty), was largely neglected and eventually abandoned.
4. In this regard, the transcript of the oral proceedings of 21st June, 2013 contain (at page 14) the following unchallenged statement by the learned Counsel for the First Respondent:
   "Mr. Mbita: …on the second ground for appeal that we had agreed to canvass before your Lordships you will notice from the appellants' submissions that they have more or less abandoned it. There has been no attempt made by the appellant to demonstrate how the court of first instance misinterpreted the provisions of the treaty; none whatsoever. So, this appeal is entirely premised on appreciation or mis-appreciation of facts".
5. Accordingly, the gravamen of this appeal now rotates on but one issue only, namely: whether the First Instance Division considered the Appellants' evidence before arriving at its judgment; and, if it did, whether it gave that evidence appropriate

appreciation? In her submission, learned counsel for the Appellants (Mrs. Madahana) narrowed down this issue to one specific matter of evidence, namely: whether the First Instance Division of this Court did consider the fact that there was a petition before the Interim Independent Constitutional Dispute Resolution Court ("IICDRC") of Kenya touching on the referendum. That was the sole issue for determination by this Appellate Division of the Court. This remained the sole issue – even though at one stage, the same counsel seemed to open wide the issue in contention. Such was the case when in her supplementary submission (i.e. Reply to the First, and Second Respondents' submissions) dated 4th April, 2013, she seemed to allege that the First Instance Division "failed to take into account the facts, evidence and law". Clearly, this was an overstatement; one without any foundation whatsoever. We will let it rest at that.

6. That being the case, what then was the fact which the Court failed to consider or, alternatively, to appreciate? According to their record of appeal (as repeated in their written submissions of 14th March, 2013, at p.3) the Appellants
"*feel aggrieved that the Court of First Instance failed to look at the evidence supplied by the Appellants …which clearly showed that there is a pending petition that was left undetermined [by the IICDRC"] before and after the promulgation [of the Constitution of Kenya]. Neither did the Court make a finding as to the evidence given in support of the first issue before it and which it was legally bound to do, thus occasioning a failure of justice.*"
7. In this regard, the Appellants conceded that the First Instance Division did, indeed, raise and address the issue of IICDRC's determination of Interim Application No. 3 of 2010. However, they emphasized that the Division then incorrectly ruled that IIDRC had conclusively determined that issue by dismissal of the petition for want of prosecution. The Appellants challenge that factual finding of the First Instance Division. They assert, instead, that IICDRC merely marked the case as SOG (i.e. "stood over generally").
8. In this Court's view, it is quite evident that the appeal before us raises a single question, but with two limbs: one simple limb; and one complex one. The simple one is this: Did the First Instance Division address the matter of the Interim Application, No. 3 of 2010, which was before the IICDRC? That is purely a question of fact. All that this Appellate Division of the Court needs to do is to carefully examine the Judgment and the relevant Record of the proceedings of the First Instance Division, to discover whether or not that issue was entertained by the First Instance Division. In undertaking that examination, this Court would of necessity be exploring the factual terrain that was traversed by the First Instance Division.
9. In doing so, however, the Appellate Division has to tread gingerly and with circumspection. It must not dig overly deep into the underlying facts of the case. It can only deal with the "facts" of what happened at the First Instance Division. What was the First Instance Division presented with? What were the issues before it? How did it handle them? What were its findings, conclusions and rulings – as set out in their Judgment? These are the kinds of "facts" (i.e considerations) that the Appellate Division takes into account on appeal. To go beyond that and attempt to reconstruct the evidence underlying the Appellants' case – and, especially, so as that evidence was

presented and played out before the municipal courts and tribunals in Kenya, is not for this Appellate Division to probe into. That is the complex question we referred to above.

10. But first, in dealing with the simple question, then, we find that the matter of Interim Application No. 3 of 2010 was indeed canvassed before the First Instance Division. That Division did deal with that matter. It did so at two levels. First, it held that the majority in the IICDRC had decided that since the Interim Independent Electoral Commission (IIEC) had already published the final results of the Referendum, it meant that the Constitution was going to be promulgated anyway; and that, therefore, the IICDRC was now faced with a mere *fait accompli*.
11. Second, the IIDRC Judges unanimously concluded that they had no jurisdiction to challenge the operationalisation of the new Constitution.
12. Given the factual nature of the issue before us, it will be necessary to look closely and extensively at the impugned judgment of the First Instance Division. That judgment recounts, among others, the following detailed facts:
    - That the specific arrangements for the Constitutional Review process in Kenya were set out in the Constitution of Kenya Review Act, No. 9 of 2008;
    - That those arrangements were to culminate in a Referendum in which the population of Kenya would vote for or against the proposed Constitution of 2010;
    - That the Appellants (the then "Claimants") challenged various aspects of the conduct of the entire Constitutional Review process. In Miscellaneous Civil Application No. 273 of 2010, Ariviza sought: (i) judicial review of the decision by the Interim Independent Electoral Commission (IIEC) to publish the Referendum result; and (ii) prohibition of the promulgation of the proposed Constitution.
    - That the High Court found no jurisdiction to entertain the above Miscellaneous Application – given the ouster of that jurisdiction by Sections 60-60A of the replaced Constitution; but noted that Ariviza had already petitioned the IICDRC as well, concerning the whole conduct of the Referendum – which petition was still pending determination before the IICDRC;
    - That on 19th August, 2010, the Appellants filed Petition No. 7 of 2010 against the IIEC and Others, seeking a recount, an audit and a nullification of the Referendum result – on the grounds that the conduct of the Referendum flouted the law, had irregularities, and contained inaccuracies in the tallying of votes;
    - That on 24thAugust, 2010, the Appellants filed with the IICDRC another Application (No. 3 of 2010: arising from the above petition) seeking to suspend the publication and promulgation of the Proposed Constitution, until the hearing and determination of that Petition;
    - That the IICDRC heard Application No. 3 of 2010 and decided:
        (a) by a majority of 3 Judges, that even if IICDRC granted the interim orders sought, such orders would be in vain for being based on an inchoate Petition, because the requisite K.Shs.2 million security for costs had not been deposited and, in those Judges' opinion, it was now too late to deposit it within the prescribed time. Thus, the IICDRC dismissed the Application; and
        (b) by unanimity of all the Judges, that the IICDRC had been presented with a fait accompli, in as much as the IIEC had already published a Gazette notice on

23rd August, 2010 confirming the result of the Referendum as final;

- That on 13th September, 2010, the Applicants filed Reference No. 7 of 2010 before the EACJ, followed by Application No. 3 of 2010 for a temporary injuction to restrain and prohibit the Kenyan Authorities from legislating and/or implementing the new Constitution, until the hearing and determination of the EACJ Reference;
- That on 23rd February 2011, the First Instance Division delivered its Ruling, dismissing Application No. 3 of 2010; but with a finding that:
  "from the totality of the facts disclosed by the affidavits and submissions of the parties, there were bona fide serious issues warranting to be investigated by this Court."

13. Having regard to the entire factual exposition presented above, the First Instance Division made its determination of the matter, thus:
"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."
14. Moreover, cognizant of the subtlety and complexity of the prayer before it, the First Instance Division added the following definitive statement for emphasis;
"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 interlocutory 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.
15. 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."
16. It is quite evident, then, that the First Instance Division:
    (1) was seized of the issue concerning the facts of this case;
    (2) duly addressed that issue at great length and adequately – namely, by providing an exhaustive recitation of and background to the facts; followed by reasoned analysis of those facts (embracing the evidence, the affidavits, the submissions, and the oral hearings);
    (3) only then, did that Court finally conclude with its own findings and determination. In particular, the First Instance Division was careful not to treat the facts that had

been presented before the Kenyan courts as if those facts were now before the First Instance Division "on appeal". The more reason then why this Appellate Division cannot and must not revisit those same facts under the guise of an appeal.

17. To claim, therefore, as the Appellants seemed to do, that the First Instance Division neither addressed nor appreciated the facts of their case, is erroneous and misconceived – if not naughty and mischievous. In our view, the First Instance Division cannot be faulted on those grounds. The judgment, as quoted in great detail above, speaks for itself.
18. As to whether the First Instance Division appreciated the facts "correctly", is quite another matter. It is not for this Appellate Division to second-guess, let alone to assess, the correctness or wrongness of the First Instance Division's determination of the facts of a Reference or Application before it. In our system, the Treaty in Article 23 (3), confers on the First Instance Division, exclusive jurisdiction to entertain and determine the contentions of fact that are presented before it. Facts are the exclusive preserve of that Division in its original jurisdiction. The Appellate Division has no concurrent jurisdiction in the area of Facts. The latter's jurisdiction is circumscribed by the Treaty – in particular, by Article 35A of the Treaty.
19. From the totality of the foregoing, it is clear that the First Instance Division was not only seized of the issue of Interim Application No. 3 of 2010; it did, indeed, entertain it extensively. Its analysis of that issue is evident on the record. Its findings and conclusions are equally evident. Now, whether those findings were "correct" or "wrong", is not for this Court to assess. Whether the First Instance Division's determination of the facts was right or wrong, is not appealable to this Division. What is relevant and justiciable in this Division, is the issue of law – namely: Did the First Instance Division reach its findings and conclusions judiciously, after due consideration of the evidence; after taking into account only relevant (not irrelevant) factors; and after exercising due analysis (not mere caprice)? On all these, there was not even an attempt, let alone allegation, by the Appellants to discredit the First Instance Division. In any event, we are satisfied that in reaching its findings and conclusions in this case, the First Instance Division exercised its discretion judiciously, not capriciously; and fairly, not unreasonably. Accordingly, even if for arguments sake, those conclusions were wrong, they would not be reviewable by, nor appealable to, this Appellate Division. In this connection, in our Judgment of 18th August, 2010 in the case of *Attorney General of Kenya v Anyang' Nyong'o & 10 Others, Appeal No.1 of 2009* we made the following review principles patently clear:

"It is not the role of an appellate bench in a judicial review, to consider the substantive merits underlying the grounds of appeal. Rather, the role of the appellate bench is to review the propriety of the exercise of discretion by the trial judge on each ground of appeal.

The question to ask, in respect of each ground is: whether the trial judge in reaching his decision, 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 was plainly wrong. If, on the other hand, the judge 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 was plainly and patently misconceived, irregular, unjust and wrong."

20. Next, we consider the more complex question (mentioned above) of whether in this appeal, this Division can and should deal with the facts of this case? First, and foremost, the East African Court of Justice (EACJ) is not a Court of Appeal vis- à- vis decisions of the municipal courts and tribunals of the Partner States. Neither the First Instance Division, nor this Appellate Division, has jurisdiction to review the judicial decisions and judgments of those municipal courts and tribunals. This is because of at least two primary reasons. Under Articles 27 (1) and 30 of the EAC Treaty, the initial jurisdiction of the EACJ pertains only to the interpretation and application of the provisions of the Treaty. Indeed, Article 27 (2) makes it crystal clear that the wider "appellate" jurisdiction for the EACJ over decisions of the municipal courts and tribunals of the Partner States, will be determined by the Council of Ministers only at "a suitable subsequent date", for which the Partner States "shall conclude a Protocol to operationalise the extended jurisdiction".
21. Secondly, and equally importantly, the respective causes of action in the present case are quite distinct. In the Kenyan courts; including the IICDRC, the cause of action was the alleged lack of propriety of the Constitutional process for promulgating the new Constitution of the Republic. In particular, the complaint was the alleged non- observance of the electoral Procedure for presenting the Constitution to the Referendum as set out in the Constitution of Kenya Review Act, No. 9 of 2008. In effect, the complaint was tantamount to an electoral petition before the IICDRC. Before this Court, however, the cause of action is totally different – namely: alleged violation, infringement and breach of Article 6 (c ) and (d), and Article 7 (2) of the EAC Treaty – in effect, a violation of a Partner State's Treaty obligations and undertakings to ensure adherence to the Rule of Law in its territory. Clearly, then, the matter before this Court cannot, and must not, be treated as an appeal of the electoral petition which formed the judicial process that took place in the Kenyan courts. Accordingly, the First Instance Division was right in holding, as it did, that it had no jurisdiction to review the decisions of the Kenyan courts in this matter. Indeed, even the Kenyan High Court declined jurisdiction, and left the matter to the IICDRC, pursuant to Sections 60 – 60A of the replaced Constitution of Kenya. To that extent, the underlying facts of this instant case as presented before the Kenyan courts, are not unlike those of the case of *Mtikila v Attorney General of Tanzania, Reference No. 2 of 2007*, in which this Court declined jurisdiction on the grounds that the Application, being in the nature of an election petition, was more in the province and domain of the High Court of Tanzania, and not of this Court.
22. The jurisdiction of the Appellate Division to entertain appeals proferred from the First Instance Division, is governed by provisions of the EAC Treaty: and in particular, by Article 35A of the Treaty (and Rule 77 of the EACJ Rules of Procedure). That Article provides as follows:-

    "35A. An appeal from the judgment or any order of the First Instance Division of the Court shall be to the Appellate Division on –

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

23. Rule 77 of this Court's Rules of Procedure is an exact replica of the wording of Article 35A above. It is quite clear from the above-quoted language, that appeals from the First Instance Division to this Appellate Division are allowed and are possible only on points of law (not fact). [For avoidance of doubt, no issue arises in the instant case – and none was argued – regarding "lack of jurisdiction" under paragraph (b), nor "procedural irregularity" under paragraph (c ) of Article 35A].
24. This Court has had occasion to pronounce itself on the question of appeals on points of law, excluding facts. In the recent case of *Alcon International Limited v Standard Chartered Bank of Uganda & Others. EACJ Appeal No. 2 of 2011 (Judgment of 16th March, 2012)* this Appellate Division stated unequivocally that:
"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 appeals."
25. In the Alcon case referred to above, the issue in contention was one of mixed law-and-fact. The parties disagreed as to who were the Parties to the litigation in the Supreme Court of Uganda. This Court held that:
"This is a question of mixed law and fact which cannot be resolved by the Appellate Division of this Court… This is a disputed matter of fact and the court below [i.e First Instance Division] did not make a finding. With respect, we of the Appellate Division cannot make findings of fact on appeal."
26. We are satisfied that, as with the *Alcon case (supra)*, the instant case involves a contention of fact, namely: Whether there was or there was no constitutional petition pending before the IICDRC. That is purely a question of fact – the assessment of which is, under Article 23 (3) of the Treaty, a preserve of the First Instance Division from which no appeal lies to this Appellate Division. To do otherwise would be to ask the Appellate Division to probe deep into the underlying facts of the case – including those facts as they played out in the Kenyan courts. Such a scenario might call for rehearing the evidence afresh; perhaps even recalling witnesses; and, then, making determinations of its own findings of fact. Clearly, that is not what was intended for the Appellate Division, nor envisaged under the legislative architecture of Article 35A of the EAC Treaty.
27. In this regard, the Treaty's exclusion of matters of fact from issues that may be appealed to the Appellate Division, is neither unique nor abnormal. Similar arrangements of that kind abound in all the municipal jurisdictions of the EAC Partner States. For example, the Judicature Act of Uganda (Cap. 13 of the Laws of Uganda, Revised Edition of 2000) provides, in Sections 5 and 6, for the appellate jurisdiction of the Supreme Court. In civil matters, appeals to the Supreme Court from judgments originally emanating from magistrates courts, are allowed only on points of law of great importance or which are in the interests of justice (Section 6 (2) ). In criminal matters, appeals to the Supreme Court are generally allowed only on points of law,

except where the offence is punishable by a sentence of death (Section 5). In Kenya, comparable rules apply in Articles 163, 164 and 165 of the new Constitution of 2010; as well as in Sections 15 through 24 of the Supreme Court Act of 2011 (Cap. 9A). In this connection, Article 163 (4) of the Constitution provides that:

"(4) Appeals shall lie to the Supreme Court --

(a) as of right in any case involving the interpretation of this Constitution; and

(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved…"

28. Similarly, Sections 15 and 16 of the Supreme Court Act, provide for appeals to the Supreme Court, but only: with the leave of the Supreme Court (Section 15); and only where the Supreme Court is satisfied that the appeal is in the interests of justice – that is to say, if the appeal involves a matter of general public importance or reveals substantial miscarriage of justice (Section 16).
29. Other examples, at a lower judicial level, include the Tax Appeals Tribunal of Uganda, whose decisions are appealable to the High Court, but only on points of law. The same formula exists in Kenya – where an identical rule is applied to decisions of a multitude of Tribunals, including the Business Premises Tribunal, Rent Restriction Tribunal, National Environmental Tribunal, National Tax Tribunal, and the Public Procurement Tribunal.
30. In the result, the appeal is dismissed against the remaining sole Appellant.
31. As regards the costs of this appeal, and of the Reference as a whole, the Court is satisfied that this entire litigation was in the best traditions of the public interest of the general public of not only Kenya, but of East Africa as a whole. The Appellants were registered voters and accredited polling agent/observer – one in the Westlands Constituency of Nairobi; the other in Nangoma Location of Busia District, Kenya. Clearly, their judicial odyssey in pursuing this important Constitutional-cum-Rule of Law matter was motivated, not by their own personal (let alone selfish) ends, but by the overarching interest of the public good.

We, therefore, order each party to bear its own costs in this matter.

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East African Court of Justice - Appellate Division
Appeal No. 4 of 2012

**Legal Brains Trust (LBT) limited And The Attorney General of the Republic of Uganda**

Appeal from the Judgment of the First Instance Division before: Businge PJ, M.S. Arach-Amoko, DPJ, J. Mkwawa, J.B. Butasi and I. Lenaola JJ, dated 30th March 2012 in Reference No.10 of 2011

Before: H.R. Nsekela, P; P.K. Tunoi, VP; E.R Kayitesi, L. Nzosaba, J.M. Ogoola, JJA
May 19, 2012

*Basic requirements of lodging a reference- Advisory opinions- Locus standi - Cause of action - Hypothetical cases- Whether there was a real dispute for adjudication.*

*Articles 30 and 36 of the Treaty – Rules: 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2010.*

Following conflicting interpretations of Article 51 (1) of the Treaty Establishing the East African Community, the Rt. Honorable the Speaker of the Parliament of Uganda requested the Attorney General of the Republic of Uganda to seek an Advisory Opinion from the East African Court of Justice. The Attorney General did not seek the Advisory Opinion but gave a written legal opinion to the effect that Article 51 (1) prescribed a limit of two terms of 5 years each for every elected Member of the East African Legislative Assembly. Subsequently, the Applicant/Appellant lodged a "Reference" in the First Instance Division of this Court, seeking that Court's interpretation of Article 51 (1).

Judgment was delivered on 3rd April and being aggrieved, the Appellant lodged this appeal claiming *inter alia* that the learned justices of the First Instance Division erred in their interpretation and occasioned a miscarriage of justice.

**Held:**

1) The question raised in the instant case before this Court, was clearly hypothetical, academic, abstract, conjectural and speculative. It should not have been entertained by the Court below.
2) The Applicant/Appellant's case lacked all the basic material requirements of lodging a reference under Article 30 of the Treaty;
3) The Applicant/Appellant being a "legal/natural" person, lacked the standing to seek an Advisory Opinion under Article 36 of the Treaty.
4) The matter lacked any underlying factual situation capable of giving rise to any real dispute. For the Court to entertain any such matter, would amount to entertaining the academic, the abstract and the speculative -with all the attendant abuse of the court process.

5) There was no proper reference under Article 30 nor a request for an Advisory Opinion under Article 36; nor is any real dispute in this matter, the judgment of the Court below was vacated as being moot.

**Cases cited:**

Aetna Life Ins. Co. v Haworth, 300 U.S. 227

Alhaji Yar'adua & Anor.v Alhaji Abubakar & Ors, Nigerian Weekly Reports, SC 274/2007, Supreme Court of Nigeria

C.D. Olale v G. o. Ekwelendu (1989) LPELER-SC, 54/1988, the Supreme Court of Nigeria

Muskrat -v-United State, 219, U.S. 346 (1911)

Re Pacific R. Commission, 32 fed. 241, 225 the USA Supreme Court

Robards v Insurance Officer [1983] ECR 171 Case 149/82

Societe d'importation Edouard Leclerc-Siplec v TFI Publicite SA and M6 Publicite SA -Reference for a preliminary ruling -Case C -412/93, European Court Reports 1995

Steel Co. aka Chicago Steel & Picking Co. v citizens for a better Environment, 532 U.S. 83 (1998)

Union Bank of Nigeria v Alhaji Bisi Edionseri (1988) 2 NWLR (pt. 74) 93

## Judgment

**Background**

1. This appeal arises from the decision of the First Instance Division given on 30th March 2012 by which the court dismissed a Reference 15th dated and lodged in that Court on December 2011 by the appellant, Legal Brains Trust (LBT) Limited.
2. The Appellant describes itself in the Reference as a company limited by guarantee incorporated under the Companies Act of Uganda. One of its objects is to defend and promote rule of law access justice, human rights, democracy and good governance through effective use of existing mechanism at the domestic and international level while the respondent is the Principal Legal Adviser of the Government of Uganda.
3. The Reference which was brought 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 2010 sought 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."
4. The circumstances giving rise to this appeal can be stated quite simply and briefly. Following the conflicting interpretations of Article 51 (1) of the Treaty Establishing the East African Community ("the EAC Treaty"), the Rt. Honorable the Speaker of the Parliament of Uganda wrote a letter requesting the Attorney General of the Republic of Uganda to seek an Advisory Opinion from the East African Court of Justice ("EACJ), pursuant to Article 36 of the EAC Treaty. The Attorney General did not seek the requested Advisory Opinion. Instead, he responded with a written legal opinion of his own on the matter -to the effect that Article 51 (1) prescribes a limit of two terms of 5 years each for every elected Member of the East African Legislative

Assembly ("EALA").

5. Thereupon, somehow the Applicant (now Appellant) surfaced as an "aggrieved" party; and lodged a "Reference" in the First Instance Division of this Court, seeking that Court's interpretation of Article 51 (1) of the Treaty. The First Instance Division obliged; and, in its judgment of 3rd April 2012, opined that, indeed, the words "eligible for re-election for a further term of five years" appearing in Article 51 (1), limits an EALA Member's elected tenure to two terms of 5 years each, for a total of 10 years. Aggrieved by the judgment of the First Instance Division, the Appellant lodged this appeal to this Appellate Division, citing the following seven grounds of appeal:
   (i) The learned justices of the First Instance Division erred in law in holding that isolating and giving the words in issue their ordinary meaning is against the principle that the Treaty shall be interpreted in good faith and in so holding reached a wrong conclusion in law and occasioned a miscarriage of justice.
   (ii) The learned justices of the First Instance Division erred in law when interpreting the terms of the Treaty in context held that because the words "further term" have a definite period of time attached to them, there can be no other terms thereafter and in so doing occasioned a failure of justice.
   (iii) The learned justices of the First Instance Division erred in law in failing to make a finding on arguments on non consecutive terms which would render the conclusion arrived at absurd, against the intentions of the framers and therefore offending the rules of treaty interpretation.
   (iv) The learned justices of the First Instance Division erred in law when they construed examples of ordinary meaning of the phrase in issue as an attempt by the appellant to rely on such examples as legal authorities, and therefore failed to consider the ordinary meaning given to the phrase in issue thereby going against a rule of treaty interpretation and occasioning a failure of justice.
   (v) The learned justices of the First Instance Division erred in interpretation when they equated the use of the word "shall" in Article 51 (1) to use of the same word in Article 25 (1) and 68 (4) of the Treaty and came to the conclusion that Article 51 (1) creates a fixed term in the same way Articles 25(1) and 67(4) do and in so finding went against the intention of the framers of the Treaty.
   (vi) The learned justices of the First Instance Division erred in law in interpreting the word "tenure" to include disqualification after having clearly held that tenure means the period when one is holding an office and in so doing occasioned a failure of justice.
   (vii) The learned justices of the First Instance Division erred in law when they failed to make a finding that letter "all is not limited to one meaning and in the context of the sentence could not import the meaning arrived at."
6. At the hearing of the appeal, the Court held a scheduling conference with all the counsel present-in which it was agreed to collapse all the seven grounds of appeal into one ground only-namely: Whether the learned judges of the First Instance Division erred in their interpretation of Article 51 (1) of the EAC Treaty? Nonetheless, in order to properly address ourselves to that specific ground of appeal, it was necessary to clear our minds as to how and why this matter came before this Court in the first place; and, in particular, whether (given the standing of the Parties) the matter was

properly before us; and whether the Court may entertain the matter and adjudicate upon it at all? In this regard, two fundamental points of law need to be addressed / clarified:

(1) Whether the Applicant/Appellant had *locus standi* to bring this matter before this Court under Article 30 or Article 36 of the EAC Treaty?

(2) Whether the matter involved a real "dispute" that was capable of being adjudicated by a court of law; or whether it was merely a speculative reference?

7. In the following paragraphs of this judgment, we consider the issue of jurisdiction under Article 30 of the Treaty; *locus standi* under Article 36 of the Treaty; and the speculative nature of the purported "Reference".

**References under Article 30 of the Treaty**

8. This instant Reference was lodged under Articles 23, 27 and 30 of the EAC Treaty and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (2010). Among the Treaty Articles, Article 30 is the one which confers jurisdiction on this Court to determine references lodged by legal and natural persons, such as the Appellant, who are resident in the Partner States. Paragraph 1 of that Article states 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 an infringement of the provisions of this Treaty... JJ

9. From a reading of that provision, it is clear that under Article 30, the cause of action must be founded on the failure of a Partner State or an Institution of the Community to apply the Treaty. In the instant case, the Appellant did not complain of any failure in the application of the Treaty, neither by a Partner State nor by an Institution of the Community. He alleged that, in reply to a request by the Speaker of the Parliament of Uganda for the Respondent (Attorney General of Uganda) to seek an advisory opinion from this Court, the Respondent declined to forward the request and, instead, interpreted the Treaty himself. The Appellant averred that the fact of the Respondent's advising the Speaker on the interpretation of Article 51 (1), constituted an infringement of the Treaty.

10. Article 30 of the Treaty opens the doors of this Court to any legal or natural person who is resident in the Community and who wishes to challenge the legality of an Act, regulation, directive, decision or action of a Partner State or an Institution of the Community. In the instant Reference, no Act, regulation, directive, decision or action was ever alleged to have been made or taken by the Republic of Uganda in violation of the Treaty. No "illegality" of any such decision or action was cited or even alluded to. No Article of the Treaty was mentioned as having been infringed by the Partner State. The only allegation on which the so called Reference is founded, is the advice that the Attorney General gave to the Speaker of the Parliament of Uganda on the interpretation of Article 51 (1) of the Treaty. However, legal advice tendered by the Attorney General of Uganda to institutions of the Republic of Uganda (such as the Parliamentary Speaker), is not in itself a justiciable or actionable matter before this

Court. After all, the Attorney General is, under the Constitution of Uganda, the Chief Legal Advisor to the Government of Uganda. To that extent, the giving of legal advice by the Attorney General would, on the face of it, appear to be the sort of decision or action that is contemplated under Article 30 (3) to be "reserved" to an institution (the Office of the Attorney General) of a Partner State. [In any event, whatever advice the Attorney General tenders may be taken or declined by the advice].

11. In consequence, we find that the Appellant did not fulfill the necessary requirements for lodging a Reference in this Court under Article 30 of the Treaty.
Accordingly, there was no reference at all that this Court could properly entertain or adjudicate upon under Article 30 of the Treaty.

**Advisory Opinion under Article 36 of the Treaty**

12. The Rt. Honourable the Speaker of the Parliament of Uganda in her letter AP 11/161/01 of 25th August 2011, requested the Honourable Attorney General of Uganda, in accordance with Article 36 of the Treaty, to:
"seek an advisory opinion on the interpretation of Article 51 (1) [of the EAC Treaty] from the East African Court of Justice.
13. That request, if adhered to, would have enabled recourse to this Court through the second available method by which this Court is approached. In the event, the Attorney General chose not to access this Court via the advisory opinion method of Article 36. He chose, rather" to tender his own legal opinion on the matter. Thereupon, the Applicant/Appellant chose to access this Court, but through the first method of recourse -namely, a Reference brought pursuant to Article 30 of the Treaty. The requirements and procedure for lodging a Reference under Article 30 have been discussed in detail elsewhere in this Judgment. In what follows, we will consider the requirements and process that would have been necessary for requesting an advisory opinion under Article 36 of the Treaty. Paragraph 1 of that Article provides as follows:
"1. The Summit, the Councilor a Partner State may request the Court to give an advisory opinion regarding a question of law arising from this Treaty which affects the Community, and the Partner State, the Secretary General or any other Partner State shall in the case of every such request have the right to be represented and take part in the proceedings."
14. First, the request for an advisory opinion is initiated by either the Summit of the Heads of State/Government, or the Council of Ministers of the Community, or alternatively by a Partner State of the Community. It is thus evident from this process that legal or natural persons -such as the Applicant/Appellant in the instant case -are excluded from requesting an advisory opinion from the Court.
15. Second, when a request for an opinion is properly made under Article 36 of the Treaty, the Partner State in question, the Secretary General of the East African Community, and all other Partner States "have the right to be represented and to take part in the proceedings" -see Article 36 (1). For this reason, Article 36 (3) stipulates that:
"Upon receipt of the request under paragraph 1 of this Article, the Registrar shall immediately give notice of the request, to all the Partner States, and shall notify them that the Court shall be prepared to accept, within a time fixed by the President of the Court, written submissions, or to hear oral submissions relating to the question".

16. Third, and even more significantly, under Rule 75 of the EACJ Rules of Procedure 2010, a request for an advisory opinion is required to be lodged in and be entertained only by the Appellate Division of this Court. That Rule provides in relevant parts, as follows:
    "75. (1) A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division ...
    (2) ... the Registrar shall immediately give notice of the request to all the Partner States and the Secretary General.
    (3) The Division may identify any person likely to furnish information on the question and shall direct the Registrar to give notice of the request to such person.
    (4) The Registrar shall in the notice ... invite the Partner State, Secretary General and such other person to present written statements on the question ...
    (5) … the Registrar shall send a copy of each such written statement to the Parties mentioned in sub-rule (4) for comments...
    (6) the Division shall decide whether oral proceedings shall be held ...
    (7) ...
    (8) The Division shall deliver its advisory opinion in open court... "
17. It is quite evident, therefore, that the procedure for seeking and prosecuting an advisory opinion in this Court was not at all contemplated by either the Applicant or the Respondent -let alone pursued -in this instant case; and no argument has been made, or claim attempted to that effect. Accordingly, the purported case that was brought before the First Instance Division under the guise of a Reference, had no basis or standing whatsoever to be lodged, to be entertained and to be adjudicated in that Court.

**Hypothetical Speculative Case**

18. It is also crystal clear that in the circumstances of this matter, the advisory opinion approach should have been the proper approach to pursue for the resolution of the instant matter. This is so because the reference that was filed in the First Instance Division was utterly deficient and improper as a Reference under Article 30 of the Treaty. Quite apart from the incapacity of the Applicant -a legal person -to lodge and prosecute a matter which under Article 36 (which can and should under that Article be initiated and prosecuted only by the Summit or the Council or a Partner State), the matter brought by the Applicant was not a "dispute", strictu sensu.
19. In this regard, it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions -namely, those concerning which no real, live dispute exists. A court will not hear a case in the abstract, or one which is purely academic or speculative in nature ¬about which there exists no underlying facts in contention. The reason for this doctrine is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts. There must be pre-existing facts arising from a real live situation that gives rise to, for instance, a breach of contract, a tortuous wrong, or other such grievance on the part of one party against another. Absent such a dispute, the resulting exercise would be but an abuse of the court's process.
20. A couple of cases from the European Court and the Supreme Court of Nigeria,

representing, respectively, the international and the municipal dimension of this phenomenon, will help demonstrate the importance and application of this doctrine:

(1) In its judgment of 9 February 1995, the Sixth Chamber of the European Court in *Societe d'importation Edouard Leclerc-Siplec v TFI Publicite SA and M6 Publicite SA* -Reference for a preliminary ruling -Case C -412/93, European Court Reports 1995 Page 1-00179, the Court held that:

"12 The Court has nonetheless considered that, in order to determine whether it has jurisdiction, it is necessary to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions judgments in *Case 149/82 Robards v Insurance Officer [1983] ECR 171 and Meilicke.*"

(2) Similarly, in its judgment of 3 February 1983, the Third Chamber of the European Court in the *Robards v Insurance Officer case (supra)*, the Court in a preliminary ruling held that:

"19 However, the task assigned to the Court by Article 177 of the EEC Treaty is not that of delivering opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. In this case, therefore, the interpretation of the provision in question should be confined to the case which is before the national court, namely that of a divorced spouse who has not remarried and is carrying on a professional or trade activity. It would be for the Commission and the Council to take the necessary measures in order to amend the provision in question if it appeared that such an amendment were necessary in order to enable other cases to be satisfactorily resolved."

(3) In *C.D. Olale v G. o. Ekwelendu (1989) LPELER-SC, 54/1988*, the Supreme Court of Nigeria held as follows:

3rd "The issue formulated by the appellant set out above is a hypothetical question and has not been given a nexus with the matters in the instant appeal. This Court has on several occasions declared and emphasized that the 1974 Constitution which established it has not conferred on it jurisdiction to deal with hvpothetica/, academic or political questions. So the Supreme Court does not deal with or determine hypothetical questions and will not in this judgment, answer the question posed in the issue for determination."

(4) In like manner, the Supreme Court of Nigeria in *Alhaji Yar'adua & Anor.v Alhaji Abubakar & Ors, Nigerian Weekly Reports, SC 274/2007*, held that:

"The continued prosecution of this appeal by the appellants in view of available undisputed facts is clearlv academic having been overtaken by events and, therefore, constituted a gross abuse of judicial process: *Agwasim v Ojichie (2004)* All FWLR (pt. 212) 1600 (2004) 10 NWLR (pt. 882) 613. One may ask -what kinds of order do the appellants want from this Court, now that the trial has been wholly completed and judgment delivered? Nothing, if I may answer. It is an abuse of process of court for a plaintiff to re-litigate an identical issue which had been decided again him: *Onyeabuchi v LNEC (2002) FWLR(Pt.103) 453, (2002)*

*8 NWLR(Pt. 769) 417 at 443*. So also where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure as has this case. Merely withdrawing the appeal would have served the appellants from this situation.

The Appeal is clearly lifeless, spent, academic, speculative and hypothetical: *Union Bank of Nigeria v Alhaji Bisi Edionseri (1988) 2 NWLR (pt. 74) 93; Ekwelendu (1989) 4NWLR (Pt. 115) 326*".

21. Similarly, the US Supreme Court has considered at length this same issue of speculative cases. The following examples will suffice:
    (1) In *Re Pacific R. Commission, 32 fed. 241, 225* the USA Supreme Court asserted that the US Constitution confers jurisdiction only in "cases and controversies", a position underlined again in *Muskrat -v-United State, 219, U.S. 346 (1911)*, thus:
    " that judicial power, as we have seen it, is the right to determine actual controversies arising between adverse litigants, duly instituted in court of proper jurisdiction ... (r) his attempt to obtain a judicial declaration of the validity of the act of congress is not presented in a lease' or controversy' ... under the Constitution of the United States... "
    The same line of judicial reasoning recurs in a much later decision, *Steel Co. aka Chicago Steel & Picking Co. -v-citizens for a better Environment, 532 U.S. 83 (1998)* in which the U.S Supreme Court thus stated;
    "Article 111 (2) of the Constitution extends the judicial power' of the United States only to 'Cases' and controversies'. We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process."
    (2) In the *Muskrat case*, the Supreme Court observed that in the famous case of *Marbury v Madison*, Marshall CJ
    It... was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between the opposing parties (was) submitted for judicial determination ..."
    (3) In the case of *Aetna Life Ins. Co. Vs Haworth, 300 U.S. 227*, the Court defined justiciable controversy as being distinct from:
    "a difference or dispute of a hypothetical or abstract character; from one that is academic or moot -one that is definite and concrete, touching the legal relations of parties having adverse legal interest, ... real and substantial controversy admitting specific relief through a decree of a conclusive character, was distinguished from an opinion advising what the law would be upon a hypothetical state of facts."
22. In the instant matter, it is not contested at all that there was:
    (a) no EALA election conducted in the Ugandan Parliament;
    (b) no campaigns or contest for any such election; and
    (c) no candidate(s) refused or stopped from contesting any such election, on the grounds of any expired term limit.
23. At best, what happened was mere speculation that the above scenario was likely to happen in the yet uncalled, un-announced elections. Such set of speculative circumstances produces not an "aggrieved" party"; nor, indeed, a real "dispute" that is justiciable in our courts of law.

24. In summary, the question raised in the instant case before this Court, was clearly hypothetical, academic, abstract, conjectural and speculative. It should not have been entertained by the Court below. We decline to

**Conclusion**

25. From all the considerations discussed above, it is quite evident that:
    (a) The matter brought to this Court by the Applicant/Appellant, lacked all the basic material requirements of lodging a reference under Article 30 of the Treaty;
    (b) The Applicant/Appellant being a "legal/natural" person, not only lacks the standing to seek an Advisory Opinion under Article 36 of the Treaty; but , indeed, did not contemplate nor even advert to the possibility of doing so;
    (c) The matter brought before this Court lacked any underlying factual situation capable of giving rise to any real dispute. For the Court to entertain any such matter, would amount to entertaining the academic, the abstract and the speculative -with all the attendant abuse of the court process.
26. In the result, this Court declines to entertain and adjudicate this matter. As there was no proper reference under Article 30; nor a request for an Advisory Opinion under Article 36; nor indeed, any real dispute in this matter, the judgment of the Court below is vacated as being moot. We make no order as to the costs of this Appeal and those in the Court below.

It is ordered accordingly.

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East African Court of Justice – First Instance Division
Application No 1 of 2012

Arising from Reference No. 1 of 2010

**Hon. Sam Njuba And Hon. Sitenda Sebalu**

And

Application No 2 of 2012
Arising from Reference No. 1 of 2010

**Electoral Commission of Uganda And Hon. Sitenda Sebalu**

Prof. Dr. John Eudes Ruhangisa, Registrar, Taxing Officer
February 12, 2013

*Consolidation of cases - Discretion- Extension of time for filing bills of costs - Formal notification of withdrawal of instructions to an advocate- No inordinate delay - Whether the right to file a bill of costs was forfeited.*

*Rules: 8,10, 14, 17(1) and Rule 2(2) of the Second Schedule: Taxation of Costs of the East African Court of Justice Rules of Procedure, 2010.*

In its judgment of 30th June, 2011 in Reference No. 1 of 2010, the court struck off the two Respondents herein from the suit. The Court directed that the Applicant should pay their costs. When the Applicants came to file their bills of costs, they and found that the Respondents had filed letters asking the Registrar not to accept bills of costs from them as the 21 days prescribed in Rule 2(2) had elapsed. Counsels for the Applicants herein then filed applications for extension of time within which to file their bills of costs.

Hon. Sam Njuba was represented by Victoria Advocates and Legal Consultants while the Electoral Commission was represented by the Attorney General of Uganda and the Electoral Commission Legal Department. The Respondent was represented by Bakiza & Company Advocates and Semuyaba Iga & Company Advocates.

Hon. Sitenda Sebalu wrote letters to Hon. Ogalo care of Victoria Advocates and Legal Consultants, and to The Secretary Electoral Commission of Uganda dated 27th July, 2011 and 10th October, 2011 respectively requesting for bills in this matter. Thereafter his advocates proceeded to inform the court of the written request made by their client.

The bill was filed by the firms of Bakiza & Company Advocates and Semuyaba Iga & Company Advocates. The bill was taxed by the Registrar at the sum of USD 105,

068.20 payable to Hon. Sitenda Sebalu by The Attorney General of Uganda and The Secretary General of the East African Community.
The two applications were consolidated as they arose from the same matter, involved the same respondent, raised same issues and sought the same orders.

On 28th of March, 2012 the Respondent herein filed affidavits in support but this was out of time.

**Held:**

1) Any change of representation in a matter must be brought to the attention of the court and parties by notification. The letters written by Hon. Sitenda Sebalu are procedurally improper and not binding as he had instructed firms of advocates to represent him in this matter and he had not withdrawn instructions or formally notified this court and parties of withdrawal of instructions.
2) There was no proper service of the demand letters dated 27th July, 2011 and 4th October, 2011 on the 1st Applicant nor was there proper service of the letters dated 11th October and 4th November 2011 on the 2nd Applicant.
3) A party who fails to lodge a bill of costs within 21 days of receiving a request from the party liable does not forfeit his right to file a bill as the Registrar can still exercise his discretion to extend such time upon the party showing reasonable cause and the delay should not be inordinate.
4) A two month delay in this case did not amount to an inexcusable or inordinate delay
5) The applicants had established sufficient reasons for the exercise of discretion and extension of time to file their bill of costs is allowed.

**Cases cited:**

Boney M Katatumba v Waheed Karim, Civil Application No. 27 of 2007 (unreported)
Byrne v ITGWU High Court Kenya, 30 November 1995, (Unreported)
Carroll Shipping Ltd v Mathews Mulcahy and Sutherland Ltd, High Court Kenya,18 December 1996 (Unreported)

**Ruling**

1. Victoria Advocates and Legal Consultants representing Hon. Sam Njuba the applicant filed a Notice of Motion Application No. 1 of 2012 supported by an Affidavit of Dan Wandera Ogalo on 24th February, 2012 while the Legal Department Electoral Commission for the Electoral Commission of Uganda filed its Notice of Motion Application No. 2 of 2012 supported by an Affidavit of Eric Sabiiti on 29th February, 2012. Both applications are seeking leave for extension of time for filing bills of costs by the applicants. The applications have been brought under Rule 2(2) of the Taxation of Costs Rules, Second Schedule of the East African Court of Justice Rules of Procedure.
2. The genesis of these two Applications goes back to Reference No. 1 of 2010 where in its judgment dated 30th June, 2011 the court struck off the 3rd and 4th Respondents, who are the Applicants herein, and directed that the Applicant in that reference, who

is the Respondent in these two applications pay their costs. The Applicant, who is the Respondent in these two applications, was as well awarded costs to be paid by the 1st and 2nd Respondents in the Reference, whose bill was filed and taxed by the Registrar.

3. In the Reference the Applicant was represented by M/s Bakiza & Co. Advocates and M/s Semuyaba, Iga & Co. Advocates. The 1st Respondent was represented by Counsel to the Community; the 2nd and 4th Respondents were represented jointly by The Attorney General of Uganda and the Electoral Commission of Uganda who filed a Response to the Reference jointly while the 3rd Respondent was represented by Victoria Advocates and Legal Consultants.
4. By letters dated 4th October and 3rd November 2012, Semuyaba, Iga & Company Advocates, Counsel for the Respondent herein, informed the Registrar that his client Hon. Sam Njuba had written letters to the Applicants herein as provided under Rule 2(2) of the Rules on Taxation and that the 21 days had lapsed after sending the request in writing to the parties liable to pay the bills. The Applicants advocates herein came to file their bills of costs and found that the Respondent's advocates had filed letters asking the Registrar not to accept bills of costs from them as the 21 days the time prescribed by Rule 2(2) had elapsed. Counsels for the Applicants herein then filed applications for extension of time within which to file their bills of costs. Hence this ruling.
5. The two applications above were fixed for hearing on 29th of March 2012 and all the parties in the applications were served on the 15th day of March, 2012, which was thirteen (13) days before the hearing date. On 28th of March, 2012 a day before the date set for hearing, the Respondent herein filed affidavits headed Affidavit in Support although he was replying to the Applicants Affidavits in support of their applications. The Registrar under Rule 10 of the Provisions of The East African Court of Justice Rules of Procedure accepted the documents but marked them "lodged out time" and informed the advocate lodging them that the affidavits were lodged out of time.
6. On the date the applications came up for hearing, due to unavoidable circumstances, the Registrar was not available for the hearing and for that reason the hearing of the applications was adjourned. The applications were again fixed for hearing on the 4th of May, 2012.
7. At the hearing, counsel for the Respondent made an application to have the affidavits filed on 28th March, 2012 in both applications and marked "lodged out of time" properly constituted in Court file and also be allowed to file a supplementary affidavit before the court could proceed with the hearing of the application. Counsel for the Applicants opposed the application.
8. At the end of the submissions I made a preliminary ruling consolidating the two applications since the two are interrelated. The two applications arise from the same matter, involved the same respondent, raised same issues and sought for same orders from the Court. I found it necessary, on the strength of the foregoing, to consolidate the two applications. By my ruling delivered on 8th June, 2012 the application for leave to file the affidavits out of time and allow filing of supplementary affidavits was dismissed. I further ordered that Applications number 1 and 2 of 2012 proceed for

hearing without the affidavits on record and that costs out of the oral application should be borne by the oral applicant/respondent.

9. At the hearing of the substantive applications Mr. Komakech representing Hon. Sam Njuba argued that the letter written under Rule 2(2) of the Courts Rules was a personal letter written by Applicant Hon. Sitenda Sebalu himself to Hon. Wandera Ogalo and therefore needed his personal attention. He further argued that Hon. Wandera Ogalo was out of Uganda at the time the letter was served and that he returned to Uganda from Southern Sudan on 4th November 2011. He thereafter travelled to India on 25th November 2011 for treatment and came back in December 2011. Mr. Komakech could not get the exact date that Mr. Ogalo came back as the passport he was referring to did not have that information because it had been replaced with a new passport. He submitted that as such Mr. Ogalo could not respond to the letter which was addressed to him until such he returned from India for treatment. Mr. Komakech attempted to produce the passport as evidence to support this allegation but this could not be admissible as he had omitted it in his affidavit in support of the application therefore it could only be admitted by making a formal application. He submitted that the letter was brought to the attention of Mr. Ogalo in late December 2011upon him resuming his chamber work.
10. Mr. Komakech contended that the letter should have been written by the firms representing Hon. Sitenda Sebalu the Respondent herein and not himself. He further contended that the letter should have been addressed to the firm representing Hon. Sam Njuba M/s Victoria Advocates and Legal Consultants but in this case it was addressed to Hon. Wandera Ogalo personally. Mr. Komakech submitted that "Had it been that the letter was from Semuyaba or Bakiza Advocates Addressed to Victoria Advocates, we totally agree that there is a breach of the rules of this court which provide that once there is a request for a bill by opposite party, then practically within 21 days, the bill should have been forwarded." He submitted that there was no formal request as envisaged under Rule 2(2) of the EACJ Second Schedule Taxation of Costs Rules
11. Mr. Komakech further submitted that Rule 2(2) is very clear and does not provide for a sanction that in the event that the party liable to file the bill fails to furnish the bill within 21 days, he shall forfeit the bill, but rather goes ahead and gives the Registrar powers to exercise his or her discretion in such matters so as to have the matter concluded.
12. Mr. Komakech also relied on the case of P*rof Anyang Nyongo & Others Vs The Attorney General of Kenya Applications No. 1 & 2 of 2010* (EACJ Registry), that this Court has unvetted jurisdiction to extend time depending on the circumstances of the case. He also relied on *Fredrick Njebi Arodi & Another Vs I. W. Waweru Trading as Watimoro Safaris, Civil Application No. 127 of 1997* (High Court Kenya) where the delay was not sufficiently explained but as it was not inordinate it did not prevent the judge from exercising his discretion in favor of the Applicants.
13. Mr. Komakech concluded by submitting that this court be pleased to grant the applicant time to file their bill of costs and have the same taxed given the fact that the 21 days would only have been there had it been that Bakiza and Company Advocates, Semuyaba and Company Advocates had written personally to Victoria Advocates

and Legal Consultants that is on record as appearing for the Applicant in this matter. He lastly submitted that Rule 2(2) does not imply that if one fails to file the bill within 21 days he or she forfeits the bill.

14. Counsel for the Applicant in Application Number 2 of 2012 Mr. Jude Mwasa submitted that the application is supported by an Affidavit of Eric Sabiit which states that the Respondent in this matter did not effectively demand that the Applicant file his bill of costs and have it taxed within time. He submitted that the letter written by the Respondent was addressed to the Secretary of the Applicant and therefore was a personal letter. He further submitted that this letter did not originate from the lawyers of the Respondent and was therefore taken as a personal letter. It had also not been brought to the attention of the lawyer who had personal conduct of the original reference. When I asked Counsel to whom should any official communication to the Commission be addressed he answered "Official communication are addressed to the Chief Secretary but when it comes to matters before a Court, they are addressed to the legal chambers and that has been the practice. In this case the Applicant has been represented by the Attorney General of Uganda and Legal Chambers of the first Respondent". He submitted that both the Attorney General and the Election Commission Legal Chambers were not informed at all about the demand notices prepared by the Respondent and his lawyers.
15. Mr. Mwasa submitted that during the period when the Respondent purportedly wrote a letter and served the Applicant herein, that was the period when the High Court of Uganda had fixed a special session for hearing election petitions arising out of the 2011 general elections. During that period which started in June, 2011 to November 2011, the Applicants lawyer who had personal conduct of the original reference was engaged in handling these election petitions that were all over the courts of Uganda. Counsel submitted that the Applicant herein being a subtle Respondent to all the election petitions, all the lawyers in its legal chambers were engaged in several courts in upcountry Uganda and there was no lawyer in its chambers who would attend to any matters that would arise until the session ended.
16. Mr. Mwasa submitted that the letter was not received by the lawyers and that the applicant came to learn of the letter when he came to file the bill of costs. He further submitted that it is not known whether the letter was received officially or not and he cannot tell because they do not know the origin of the person who stamped on it. He submitted that upon perusal of the record he learned that the lawyers filed another letter to this court without serving the same to the Applicant's lawyers. Upon the Applicant learning about both of the letters from this Court, it filed this application seeking extension of time for the reasons given.
17. Mr. Mwasa concluded by submitting that the facts alluded to amount to sufficient cause for this Court to under Rule 4 of its rules to grant the Applicant extension of time to have their bills filed and taxed. He also submitted that Rule 2(2) of the Second Schedule of the Rules as submitted by his colleague do not provide or bar successful parties in this Court from lodging their bills of costs having failed to prepare to lodge them in time, it does not bar them to seek extension of time to have their bills filed and taxed. He prayed that the court considers the circumstances and facts at hand to invoke its inherent powers under Rule 4 and Rule 2(2) of the Second Schedule of the

rules to extend time and allow the applicants to file their bills and have them taxed out of time.

18. In response Mr. Bakiza Counsel for the Respondent submitted that no sufficient reasons have been advanced in Application No. 1 justifying the delay and the court should therefore, not be invoked to exercise its discretion to regularize what the Applicant failed to do within the prescribed rules. He submitted that even if the Court was to exercise its discretion to extend time, the Court should reject reasons advanced for the delay as being insufficient in the circumstances and dismiss this Application with costs.
19. Mr. Bakiza emphasized the words "party liable" in Rule 2(2) and submitted that since Sitenda Sebalu was party to the proceedings it is reasonably conceived in this rule that the party liable to pay was Sitenda Sebalu who should originate the demand or request for the bill of costs and should not be faulted for doing so. He further submitted that in as much as Victoria and Company Advocates received the letter addressed to Hon. Wandera Ogalo an advocate within the law firm and stamped it without a comment they had undertaken to pass it over to him as he had personal conduct of this matter.
20. In response to the explanation why Hon. Ogalo did not act in time upon his return, Counsel submitted that no explanation has been given for that failure and that Hon. Ogalo chose to travel on a trip for which no evidence has been adduced. He averred that Hon. Ogalo simply travelled and abandoned his responsibility not only to the Respondent but to the Court itself and even to his client. He further submitted that Hon. Ogalo in his affidavit does not explain why for the three days before he again travelled from Uganda he did not attend to chamber work. He submitted that those three days were enough for him either to act personally or to instruct anybody within the law firm in the same way he instructed somebody who represented him in this application to take the necessary step. He also submitted that Hon. Ogalo did not obtain an affidavit from the secretary or the clerk of his firm to show what transpired.
21. Mr. Bakiza also submitted that for Counsel Ogalo to submit the bill of costs on 3rd January, 2012, close to about four months constitutes inordinate delay and is inexcusable. Counsel relied on the case of *Jane Bugiriza Versus John Nathan Osapil, Uganda Supreme Court, Application No. 7 of 2005* where the Supreme Court was faced with a similar situation of extension of time and it held that a delay for two years and 19 days before filing a bill of costs constituted inordinate delay and was inexcusable. The court observed that the essence for requesting for the bill of costs is that the party paying must know his or her liability without delay and that when a bill of costs causes unquantified date which may cause imprisonment of the party liable, the bill continues to hang on the respondent's head and that there must be an end to litigation.
22. In regard to Application No. 2 Mr. Bakiza submitted that once the letter was received as it was by the Electoral Commission on 11th October, 2011the Respondent was not concerned with the goings on at the Electoral Commission. He submitted that the attempts to explain the failure by stating that all the lawyers were involved in election petitions is not reasonable excuse and that no evidence was adduced from the secretary of the Electoral Commission. He submitted that the duty for placing the

necessary evidence before the court lies on the Applicant and that duty has not been discharged.

23. Mr. Bakiza concluded by praying that the application be dismissed with costs on ground that the delay was inordinate and inexcusable and no sufficient reasons have been advanced for grant of extension of time within which to file a bill of costs. He also prayed that in the event that the application is allowed, the cost be payable by counsel who was in default for lodging the application for the bill of costs late.
24. Mr. Semuyaba also for the Respondent in both applications in his additional submissions to Mr. Bakizas averred that the mere fact that Hon. Ogalo is on court record as the lawyer who represented the party and the mere fact that his law firm is the one that filed the court papers and received and got receiving stamp is a clear testimony that his law firm received the communication.
25. With regard to Application No. 2 Mr. Semuyaba submitted that the Electoral Commission is an institution which receives communication through its Secretary and that the letter was duly received by their registry on 11th October 2011 and duly stamped. He averred that the affidavit of Eric Sabiit was full of false hoods by stating that their organization was not served and cannot come to court and advance any reasonable cause as to why they sat on their right after a request was made under a mandatory requirement for them to file their bill of costs within 21days. He also submitted that Mr. Eric Sabiit could not have been an advocate of the party as required under Rule 2(1) because he was an employee of the Electoral Commission. He submitted that there is no evidence that the Electoral Commission Law Chambers is a registered law chambers.
26. He also added that in the case of John Bagiriza, once the party does not as soon as practicable file their bill of costs, then they are deemed to lose that bill of costs. Also relying on the authority of the case of Anyang Nyongo he submitted that no sufficient reason has been advanced and the application should be denied. He prayed that the Application be dismissed with costs.
27. In rejoinder Mr. Komakech for the Applicant in the first application submitted that it is not in dispute a letter was written and received by Victoria Advocates but what is in dispute is that it was to the attention of Hon. Ogalo thus making it personal. He also submitted that Hon. Ogalo acted with diligence by writing a letter dated 2nd January to Counsel for the Respondent enclosing a draft bill of costs seeking views and indicating his intention of filing it. He acted upon the letter from Sitenda Sebalu having been brought to his attention.
28. Mr. Mwasa in rejoinder submitted that the Electoral Commission Law Chambers is one of the registered firms in Uganda and therefore it was duly representing the Applicant. He further contended that Mr. Eric Sabiit had personal conduct of this matter because he is the one who handled the original reference and he was among the lawyers who were handling election petitions in Uganda during that period and according to the Uganda laws, all the election petitions take precedence over all matters pending in court.
29. Having considered submissions by counsels for the parties in both applications I have come up with five issues that I need to make findings on as follows:
    1. Whether a party represented by an advocate in a case can act in person without

formally withdrawing instructions or filing a notice of change of advocate.

2. Whether the letters in contention served on the applicants by the respondents, constituted proper service as envisaged under Rule 2 (2) of the Taxation of Costs Rules.
3. Whether, under Rule 2(2) Second Schedule: Taxation of Costs of the East African Court of Justice Rules of Procedure, a party who fails to lodge a bill of costs within 21 days of receiving a request from the party liable forfeits his right to file a bill.
4. Whether the delay was inordinate
5. Whether sufficient reasons have been established, as provided under Rule 4 of the East African Court of Justice Rules of Procedure, to warrant an extension of time to file bills of costs.

Whether a party represented by an advocate in a case can act in person without formally withdrawing instructions or filing a notice of change of advocate.

30. The Respondent was represented by the firms of Bakiza & Company Advocates and Semuyaba Iga & Company Advocates in Reference No. 1 of 2010. In its judgment dated 30th June, 2011the court struck off the 3rd and 4th Respondents, who are the Applicants herein, and directed that the Applicant, who is the Respondent in these two applications pay their costs. The Applicant, who is the Respondent in these two applications, was as well awarded costs to be paid by the 1st and 2nd Respondents in the Reference. The bill was filed by the firms of Bakiza & Company Advocates and Semuyaba Iga & Company Advocates. The bill was taxed by the Registrar at the sum of USD 105, 068.20 payable to Hon. Sitenda Sebalu by The Attorney General of Uganda and The Secretary General of the East African Community.
31. From the background above, the applicants herein, who were the 3rd and 4th Respondents in the reference and were awarded costs, wish to have their bills of costs in Reference No. 1 of 2010 taxed. Under Rule 17(1) on representation a party to any proceedings in the Court may appear in person or by an agent and may be represented by an advocate. Hon. Sitenda Sebalu is Represented in Reference No. 1 of 2010 by the firms mentioned above and has never withdrawn instructions from being represented by the said firms. The mere mention of the word party in the rules does not mean that, where there is an advocate on record representing a party, the party can act in person without formally notifying the court and the other parties of its intention to withdraw instructions or withdrawal of instructions. Rule 18 provides that a party may, change its advocate but shall within 7 days of the change, lodge with the Registrar notice of the change and shall serve a copy of such notice on each party. This was not done.
32. Hon. Sitenda Sebalu personally wrote letters dated 27th July, 2011 to Counsel Ogalo and 10th October, 2011 to the Secretary, Electoral Commission requesting for bills in this matter and thereafter his advocates proceeded to inform the court of the written request by its client. This shows that at one stage, in the cause of proceedings in this matter, the party purports to act in person then thereafter the advocates representing continue acting on his behalf. Any change of representation in a matter must be brought to the attention of the court and parties by notification otherwise it may lead to confusion in a matter as is the case here. In my view the letters by Hon. Sitenda Sebalu are procedurally improper and not binding in view of the fact that he

instructed firms of advocates to represent him in this matter and has not withdrawn instructions or formally notified this court and parties of withdrawal of instructions. I therefore answer issue number one in the negative.

Whether the letters in contention served on the applicants by the respondents, constituted proper service as envisaged under Rule 2 (2) of the Taxation of Costs Rules.

33. I will again refer to the rule on representation above and say that the firm of advocates representing Hon. Sam Njuba is Victoria Advocates and Legal Consultants while the Electoral Commission is being represented by the Attorney General of Uganda and the Electoral Commission Legal Department. This is evidenced by their Response drawn and filed jointly in the Reference and the representation at the hearing of proceedings in the Reference. Hon. Sitenda Sebalu wrote a letter to Hon. Ogalo care of Victoria Advocates and Legal Consultants, and to The Secretary Electoral Commission of Uganda. The letters ought to have been addressed to the firms on record as representing the parties and possibly for the attention of Hon. Ogalo of Victoria Advocates and Legal Consultants or Eric Sabiit of Legal Department Electoral Commission of Uganda or Christine Kaahwa of The Attorney Generals Chambers. I therefore answer issue number two in the negative for the reasons stated hereunder.
34. Taking into consideration all the submissions given by both counsel for the applicants and respondent and the position of the law, I am of the opinion that there was no proper service of the demand letters dated 27th July, 2011 and 4th October, 2011 on the 1st applicant nor was there proper service of the letters dated 11th October and 4th November 2011 on the 2nd applicant for the following reasons/findings.
35. The law under Rule 8 (6) of the East African Court of Justice Rules of Procedure provides that, "Every pleading lodged in Court shall indicate the address of service of the party making it and be signed by that party or by the party's advocate or a person entitled under Rule 17 to represent the party." And whereas Rule 14 provides that, "Where by these Rules a document is required to be served on any person service of that document shall be made by tendering to that person a duplicate thereof and requiring him or her to endorse the original acknowledging service."
36. Referring back to the documents/pleadings lodged in this honourable court with regard to the original Reference No.1 of 2010 which gave rise to this bill of cost, the address for the 3rd respondent for purposes of service as provided in the 3rd Respondent's Response to the Reference was Sam K. Juba, C/o Victoria Advocates & Legal Consultants. And so far there is neither change of address nor any new address that has been furnished in this court for purposes of service in so far as the bill of costs is concerned; the procedure therefore was to use the same address in addressing the notice/request. Moreover it's the rule of practice that when a person employs the services of an advocate/firm for a particular matter then every correspondence regarding that matter will have to go through the advocate/firm. The respondent henceforth erred in fact and Law by addressing the letter dated 27th July, 2011 to Counsel Wandera Ogalo, MP, EALA, as if it was a letter relating to him as a member of EALA instead of addressing it to Victoria Advocates & Legal Consultants for the attention of Counsel Wandera Ogalo who had conduct of the case.
37. For ease of reference and understanding, the contents of the said letter are here below

reproduced:

> "To: Ogalo
> EALA (MP)
> Counsel for 3rd Respondent
> Hon. Sam K. Njuba
>
> Dear Sir,
>
> First and foremost, I write to thank you for the spirited fight you exhibited without bias throughout the whole trial that has enabled the people of East African Community acquire the appellant extended Jurisdiction of the East African Court of Justice.
>
> I also write to kindly request you for a copy of your bills of costs as ordered by the court of Justice in Arusha.
>
> Lastly, accept my sincere appreciation for your legal prowess and maturity that you and my two sets of lawyers exhibited that has earned me great respect in this region a as seasoned litigant. This clout might compel me to stand for the EALA (MP) slot in order to foresee the quick operationalize of the 2005 protocol by Counsel of Ministers.
>
> Yours faithfully,
>
> HON. SITENDA SEBALU
> Applicant"

38. I am strongly convinced that the failure of the applicant to act promptly was possibly because there was no proper service effected upon the firm as the letter was more of a personal letter than official referring to things that have nothing to do with requests for bill of costs. I am inclined to hold that the notice served on the 1st applicant did not constitute proper service under Rule 2(2).
39. Again with regard to the 2nd applicant, being an independent body and a registered law firm in Uganda, the address of service as furnished in this court in the original Reference ought to have been used by the respondent in addressing the notice. The respondent addressed the letter to the Secretary of the Commission rather than addressing it to the Legal Department of the Electoral Commission, as it was provided in the pleadings in relation to the original Reference. That is; Legal Department, Electoral Commission, Plot 55 Jinja Road, Kampala. And because of such error, the 2nd Applicant claims that it is unclear whether the letter was received by the Commission or the Attorney General, Uganda but is certain that it never reached the legal chambers and therefore never reached the lawyer who had personal conduct of the case.
40. Also for ease of reference and understanding, the contents of the said letter are here

below reproduced:

To:
"The Secretary,
Electoral Commission,
Kampala-Uganda

Dear Sir,

As you are aware, Judgment of the above mentioned case was delivered on 30th June, 2011in the East African Court of Justice-Arusha.

In this judgment, the Electoral Commission of Uganda as the 4th Respondent was awarded some costs.

The Purpose of this letter therefore, is to request you avail to me copies of your bills of costs to this effect and also other bills of costs as awarded to you in Supreme Court of Uganda in earlier dismissed Election Petition Appeal. This will enable me get quick intervention of Chairman of NRM party and H.E the President of Uganda for a quick bail out.

I am considering standing as a member of EALA in order to participate in the quick operationalization of the protocol 2005 in extending the appellant jurisdiction of the East African court of justice without any encumbrances on my head.

Yours faithfully,

HON. SITENDA SSEBALU WILLIAM
APPLICANT
NRM FLAG BEARER"

41. The contents of such a letter which had nothing to do with bill of costs could in effect mislead or confuse any prudent mind at the registry and be the cause for his/her failure to place it to the appropriate department or section
42. I find that the notice served on the 2nd Applicant by the Respondent failed to satisfy Rule 2(2) as it was required to be sent by the Respondent or his advocates and addressed to the Legal Department as the practice had been during the pendency of Reference No.1 of 2010.
    Whether, under Rule 2(2) Second Schedule: Taxation of Costs of the East African Court of Justice Rules of Procedure, a party who fails to lodge a bill of costs within 21 days of receiving a request from the party liable forfeits his right to file a bill.
43. To begin with I will cite a decision relied on by counsel in these applications, that is, this courts Appellate Division ruling in Application No 1 and 2 of 2010 *Professor Anyang Nyongo & 10 Others Vs The Attorney General of Kenya* where the Court referred to the Katatumba case and said:
    "In *Boney M Katatumba vs Waheed Karim, Civil Application No. 27 of 2007*

*(unreported)*, Mulenga JSC (as he then was) while construing rule 5 of the Uganda Supreme Court Rules stated

'Under r 5 of the Supreme Court Rules, 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 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 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.'

44. This Court appreciates the reference to the Court's "unfettered discretion" indicated in the Katatumba case above. Nonetheless, as a matter of practical application and good jurisprudence, the Court's "unfettered" discretion arises only after "sufficient reason" for extension of time, has been established. Therefore, to that extent, the Court's discretion in an application to extend time is not unlimited."
45. I have considered submissions by counsels for all parties and find that a party who does not file a bill of costs within the prescribed time under Rule 2(2) does not forfeit his right to file his or her bill. This is because the Registrar has discretion under the same rule to allow such further time for filing the bill. The Rule reads that "A bill of costs shall be lodged as soon as practicable after the making of the order for costs and not later than twenty-one (21) days after a request in writing therefore by the party liable, or such further time as the Registrar may allow." The emphasis is mine and this is the particular line that gives the Registrar discretion to extend time within which a bill will be filed. This means that a party who fails to lodge a bill of costs within 21 days of receiving a request from the party liable does not forfeit his right to file a bill as the Registrar can still exercise his discretion to extend such time upon the party showing reasonable cause and the delay should not be inordinate. Issue No three is therefore answered in the negative .

**Whether the delay was inordinate**

46. I reiterate my findings hereinabove on issue No. 1 that the letter did not satisfy proper notice as envisaged under Rule 2(2) and if it had satisfied the said rule, then time would have started running on the 27th July 2011. In my view this cannot be said to constitute inordinate delay due to the fact that it is still difficult to say with certainty specific period of delay that would be considered inordinate. This depends on the circumstances of the case and the effects of the delay to the other party. The point to consider here is whether the delay claimed by the respondent as inordinate and inexcusable, prejudices the interest of the respondent and whether the delay gives rise to a substantial risk. In the case of *Carroll Shipping Ltd V Mathews Mulcahy and Sutherland Ltd, Unreported, High Court Kenya,18 December 1996*, a delay of 15 years since the issue of the plenary summons was held to be "undoubtedly inordinate", while in the case of *Byrne V ITGWU, Unreported ,High Court Kenya,30 November 1995*, a delay of 4 years was held to be ordinate. In this matter if we count the time from the date when Hon. Ogalo claimed to have seen the letter according to his

affidavit, to the time he came to file the Notice of Motion, there was a two months delay. In my observation therefore I do not think this amount to an inexcusable or inordinate delay and I disagree with counsel for the respondent's submission that this was inordinate delay.

47. With regard to the 2nd Applicant, the reasons provided for not filing their bill of Costs within the prescribed time is simple and straight forward. They claim that they did not receive the notice or the copy of the letter they were copied by the Respondent addressed to the Registrar requiring him to take notice of the fact that the 2nd Applicant had been given notice to file their bill of costs and that the twenty one days required for them to do so had lapsed.
48. The 2nd Applicant's argument on why they did not receive the said letter is that it was addressed to the Secretary of the Commission instead of having the notice addressed to the legal department.
    Whether sufficient reasons have been established, as provided under Rule 4 of the East African Court of Justice Rules of Procedure, to warrant an extension of time to file bills of costs.
49. Having considered submissions by counsels for all parties I am of the view that since the letters being relied upon as written requests for the bills as provided under Rule 2(2) of the East African Court of Justice Rules of Procedure do not in themselves constitute requests as provided for in the Rules of the Court, there was no proper service. Although the applicants have not adduced supplementary evidence other than Hon. Ogalo's affidavit to support the assertion that Hon. Ogalo had travelled during the period, I do not have reasons to doubt that affidavit. The 2nd applicant's lawyer's argument that all advocates in the legal department of the Electoral Commission were involved in election petitions during that period cannot be sustained as this court has its own rules and election petitions in Uganda cannot take precedence over matters of the East African Court of Justice. It should be understood that the legal department of the Electoral Commission is not constituted of one lawyer and this Court cannot condone personalization of official matters like the one under consideration. However, the effect of this finding is diluted by my earlier finding on the letters as written requests envisaged under Rule 2 (2) which is in negative.
50. I should point out as I conclude that the respondent messed up the procedure for service when he decided to unceremoniously take over from his lawyers and acted contrary to the law. He should not be made to benefit from his own messy intervention that made others to suffer.
51. It is in the strength of the foregoing that I find the applicants having established sufficient reasons, as provided under Rule 4 of the East African Court of Justice Rules of Procedure, to warrant me exercise my discretion and extend time to file bills of costs as applied by the applicants. Holding otherwise in these circumstances may amount to shutting out the applicants from filing their bill of costs for taxation and this would cause injustice. The applicants are ordered to file their respective bills of costs within the next 14 days from the date of this ruling. I also order that each party should bear its own costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No.2 of 2013

**Benoit Ndorimana And The Attorney General of the Republic of Burundi**

Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Fakihi A. Jundu, J
November 28, 2014

*Cause of action – Damages for closure of business- Lack of Jurisdiction - Locus standi - No final and enforceable decision.*

*Articles 6(d), 7(2), 23, 27, 30 of the Treaty for the Establishment of the East African Community.*

The Applicant, a Burundi resident and a businessman claimed that he was arrested on 15th March 1989 by the Intelligence Service of the Republic of Burundi and detained until 6th August 2002. After his release, he filed a case against the Government of Burundi in the Administrative Court of Burundi claiming damages for losses suffered when his pharmaceutical enterprises were closed following his detention. On 14th June 2004, the Administrative Court found in the Applicant's favour and awarded him BIF 1,000,300,000.00 with interest at the rate of 6% per annum from the date of the judgment until full payment.

Aggrieved by the judgment, the Respondent filed an appeal in the Supreme Court of Burundi, Administrative Chamber and on 28th March 2012, the judgment of the Administrative Court was overturned. Being dissatisfied by the judgment, the Applicant applied for review on 25th May 2012, and the matter was still pending when he filed this Reference.

The Applicant sought declarations *inter alia* that the Respondent's refusal to pay damages awarded infringed that Treaty and an order that the sum awarded should be paid.

The Respondent contented *inter alia* that the Court had no jurisdiction hear the matter or to order payment of damages.

**Held:**

1) While the Court had jurisdiction to entertain this Reference, it did not have jurisdiction to order payment of damages for a case pending before the Court of a Partner State and therefore could not grant the orders sought.
2) There was no final and enforceable decision in the matter before the Court in Burundi. So, although the Applicant had locus standi, his Reference did not disclose a cause of action namely a "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'. Thus there was no legal ground for the Reference and for this reason, violation of Articles 6(d) and 7(2) of the Treaty could arise.

**Cases cited:**

Prof. Peter Anyang Nyong'o & 10 others v The Attorney General of Kenya & 2 others, EACJ Reference No.1 of 2006

The Attorney General of the Republic of Rwanda v Plaxeda Rugumba, EACJ Appeal No.1 of 2012

Venant Masenge v The Attorney General of the Republic of Burundi, EACJ Reference No.9 of 2012

**Judgment**

**Introduction**

1. This is a Reference by one Benoit Ndorimana, a resident of the Republic of Burundi (hereinafter referred to as the "Applicant"). His address for the purpose of this Reference is indicated as C/O Mr. Horace Ncutiyumuheto, Boulevard Patrice Lumumba, P.O. Box 1374 Bujumbura, Burundi.
2. The Reference was filed on 8th April 2013 under Articles 3(3)(b), 6(d), 7(2), 8(4), 27(1) and 30(1) &(2) of the Treaty Establishing the East African Community (hereinafter referred to as the "Treaty") and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as the "Rules"). The Respondent is the Attorney General of the Republic of Burundi, who is the Principal Legal Adviser of the Republic of Burundi, and is being sued on behalf of the Government of Burundi.
3. When this Reference was filed, the Secretary General of the East African Community had been sued as the 2nd Respondent, but in an Amended Reference filed on 18th November 2013, the Applicant withdrew the 2nd Respondent from the Reference.

**Representation**

4. The Applicant was represented by Mr. Isidore Rufyikiri, but the latter was replaced by Mr. Horace Ncutiyumuheto following a notice of change of advocate. Mr. Nestor Kayobera appeared for the Respondent.

**Background**

The background of the case can be summarized as follows:

5. The Applicant, a Burundi citizen and a businessman was arrested on 15th March 1989 and detained until 6th August 2002 when he was released. After his release, he filed a case registered under Reference RAC 2048 against the Government of Burundi in the Administrative Court of Burundi claiming damages for losses his pharmaceutical enterprises suffered following his alleged arbitrary imprisonment and closure of his business.
6. On 14th June 2004, the case was determined in favour of the Applicant and the Government of Burundi was condemned to pay him a total amount of BIF 1,000,300,000.00, the latter amount to be increased by the payment of interest of 6% per annum from the date of the judgment until full payment.
7. The Attorney General of the Republic of Burundi, aggrieved by the judgment, filed an appeal to the Supreme Court of Burundi, Administrative Chamber and the case was registered under Reference RAA 669.

8. The Applicant thereafter filed a preliminary objection opposing the admissibility of the case by the Supreme Court, arguing that it was filed out of the one month period to lodge an appeal as prescribed by Article 197 of the Civil Procedure Code of Burundi.
9. On 26th March 2012, the Supreme Court delivered a preliminary ruling on the matter, rejected the objection raised by the Applicant, and invited the parties to file their substantial pleadings.
10. On 28th March 2012, the Supreme Court delivered a judgment in Reference RAA 669 and overturned the judgment of the Administrative Court of Bujumbura of 14th June 2004.
11. On 25th May 2012, the Applicant, dissatisfied with the judgment, applied for review to the Supreme Court of Burundi and the case was registered under Reference RCC 21625.
12. While the matter was still pending before the Supreme Court, the Applicant filed the instant Reference, on 8th April 2013.

**The Applicant's case**

13. The Applicant's case is contained in the Reference dated 8th April 2013, as amended on 18th November 2013, his Affidavit in support sworn on the same day together with its annexures, the Written Submissions filed on 11th March 2014 and List of Authorities filed on 18th July 2014. In a nutshell, his case is as follows.
14. The Applicant alleged that he was arrested on 15th March 1989 by the Intelligence Service of the Republic of Burundi which immediately and arbitrarily closed all his pharmaceutical enterprises. He contended that upon his release, on 6th August 2002, he sued the Government of Burundi before the Administrative Court of Bujumbura for indemnification and a judgment was delivered in his favour against the Republic of Burundi for the sum of BIF 1,000,300,000.00 with interest of 6% per annum accruing on the unpaid amount until full payment.
15. It is his contention that despite several demands for payment, the last one being by a letter to the Minister of Justice dated 4th November 2012 and the legal deadline for the latter to respond being three months after receipt of the letter, that is, by 10th February 2013, the Government of Burundi has failed and/or refused to pay him the damages he was awarded together with accrued interest and that the said failure or refusal is unlawful and constitutes an infringement of Articles 6(d) and 7(2) of the Treaty.
16. The Applicant therefore seeks the following orders against the Respondent:
    (a) A declaration that the refusal by the Respondent to pay damages awarded by the Court to him is an infringement of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
    (b) A declaration that the Applicant has a full right to enjoy his vested interests without any prior conditions;
    (c) An order that the Applicant be immediately paid by the Respondent the amount of BIF 1,660,498.00 ;
    (d) An order that costs of the Reference be paid by the Respondent

**The Respondent's case**

17. The Respondent filed a response to the Reference on 7th June 2013, an Affidavit in support sworn by Mr. Sylvestre Nyandwi on 3rd December 2013, Written Submissions on 14th April 2014 and a List of Authorities on 17th September 2014.
18. The Respondent contended that he filed an appeal to the Supreme Court of Burundi, Reference RAA 669 against the judgment of the Administrative Court of Bujumbura and that the Supreme Court overturned the said decision on 28th March 2012.
19. The Respondent further contended that the Applicant herein applied for review of the Supreme Court judgment under Reference RCC 21625 and that the case was still pending before that Court.
20. The Respondent also contended that, in accordance with Articles 27(2) and 30(3) of the Treaty, this Court does not have jurisdiction to entertain matters that are before national courts of a Partner State – in this case, the Supreme Court of Burundi - and that this Court does not have jurisdiction to order payment of damages for a case pending before the Highest Court of a Partner State.
21. The Respondent therefore prayed this Court to declare that it cannot grant the orders and reliefs sought by the Applicant and consequently, to dismiss the Reference with costs.

**Scheduling Conference**

22. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 13th February 2014 at which the following were framed as issues for determination:
    a) Whether the Court has jurisdiction to entertain the Reference;
    b) Whether the Reference is time-barred;
    c) Whether the Applicant is entitled to the orders sought.

**Determination of the issues**

Issue No.1 – Whether the Court has jurisdiction to entertain the Reference

**Submissions**

23. The question as to whether the Court has jurisdiction to entertain this Reference was raised by Counsel for the Respondent. He submitted that, in view of the provisions of Article 27(1) and (2) of the Treaty, some of the prayers and orders sought by the Applicant fall outside the jurisdiction of this Court. In this regard, Counsel asserted that prayer (a) seeking a declaration that the refusal of the Respondent to pay damages to the Applicant is an infringement of Articles 6(d) and 7(2) of the Treaty and prayer (d) about costs can be entertained by the Court and granted, if proved by the Applicant. In support of his submission, learned Counsel referred the Court to the following decided cases: EACJ Appeal No.1 of 2012: T*he Attorney General of the Republic of Rwanda Vs Plaxeda Rugumba (Plaxeda Rugumba case)* and *EACJ REF. No.1 of 2007: James Katabazi & 21 Others Vs The Secretary General of the East African Community & The Attorney General of the Republic of Uganda (James Katabazi case)*. He, however, submitted that prayer (b) seeking "a declaration that the Applicant has full right to enjoy his vested interests without any prior conditions" and prayer (c) seeking an "order that the Applicant be immediately paid the amount of

BIF 1,660,498,000.00 by the Respondent" fall outside the jurisdiction of the Court as provided by Articles 27(2) and 30(3) of the Treaty, since the matter is pending before the highest court of competent jurisdiction (i.e. the Supreme Court of Burundi) in a Partner State. To fortify his argument, he relied on the decision of this Court in EACJ REF. No. 8 of 2011: *Prof. Nyamoya Francois Vs The Attorney General of the Republic of Burundi & The Secretary General of the East African Community* (para 43 of the Judgment).

24. In response to the Respondent's arguments on this issue, Counsel for the Applicant submitted that this Court derives its mandate from Articles 23(1), 27(1) and 30(1) of the Treaty.
    In Article 23(1), it is stated that "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."
25. According to Article 27(1) of the Treaty, "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."
26. As for Article 30(1) of the Treaty, it 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."
27. Counsel further submitted that, with regard to the question of non-exhaustion of local remedies raised by the Respondent's Counsel, the Applicant, being a natural person who has direct access to the Court under Article 30(1) of the Treaty, is not required to first exhaust local remedies before bringing a case to this Court.
28. As for the case Reference RCC 21 625 still pending before the Supreme Court of Burundi, he contended that the process which brought the matter before the Supreme Court was unlawful on the ground that the Applicant was forced by the Government of Burundi to follow an "illegal procedure." He maintained that, in any case, he had written to the Supreme Court requesting the suspension of all proceedings in the matter since the case had been brought to this Court.
29. After referring the Court to some decided cases, to wit, EACJ REF. No.1 of 2006: *Prof. Peter Anyang Nyong'o & 10 others Vs The Attorney General of Kenya & 2 others; Plaxeda Rugumba case(supra)*; *James Katabazi case(supra)*, where this Court had to address issues pertaining to its jurisdiction, Counsel wrapped up his submissions by contending that this Court has jurisdiction to entertain the case and to decide on the orders sought, since there are no similar prayers in the Reference before the Supreme Court of Burundi as wrongly submitted by the Respondent.

**Analysis of the issue**

30. We have carefully considered the opposing arguments in respect of the instant issue. We first of all note 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. As persistently stated by the Applicant, his Reference seeks, among other orders, that this Court determine whether the refusal by the Government of Burundi to abide by the Laws of Burundi in paying the amount awarded to him by the Administrative Court of Bujumbura is an infringement of Articles 6(d) and 7(2) of the Treaty.

31. In his written submissions and during the hearing held on 19th September 2014, Counsel for the Respondent conceded that this Court has jurisdiction to entertain some prayers of the Reference, namely, a prayer seeking a declaration that the refusal by the Government of the Republic of Burundi to pay damages as per the decision of the Administrative Court of Bujumbura is an infringement of Articles 6 (d) and 7(2) of the Treaty [prayer (a)] and another one regarding costs of this Reference [prayer (d)]. Learned Counsel, however, maintained that the Court lacks jurisdiction to determine other prayers [i.e. prayers (b) and (c)] sought by the Applicant.
32. Guided by the Court's previous decisions on similar matters [see *Plaxeda Rugumba case (supra), Peter Anyang Nyong'o case (supra), James Katabazi case (supra) and EACJ REF. No.9 of 2012, Venant Masenge Vs The Attorney General of the Republic of Burundi]*, we are of the decided opinion that the Court has jurisdiction to entertain prayers (a) and (d) of the Reference. However, in light of the aforementioned case law, we agree with the Respondent that this Court lacks jurisdiction to grant prayers (b) and (c) since they fall outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty.

**We therefore answer issue No. 1 partly in the affirmative.**

33. Having so decided, we now turn to the substantive matter pertaining to whether or not there has been violation of Articles 6(d) and 7(2) of the Treaty and the question of the admissibility of this Reference while there is another related case pending before the Supreme Court of Burundi. This imperatively calls for a determination on whether the Reference discloses a cause of action under Article 30(1) of the Treaty.
34. As recalled above, the substratum of the Reference is the Applicant's contention that, by refusing to execute "a definitive and enforceable" judgment rendered by the Administrative Court of Bujumbura, awarding damages to him for loss allegedly caused by the Government of Burundi, the latter violated Articles 6(d) and 7(2) of the Treaty. The Respondent's main opposing argument is that there is no infringement to any provision of the Treaty since there is no enforceable judgment that the Government has failed to execute as the very judgment referred to by the Applicant has been overturned by another judgment of the Supreme Court of Burundi and that an application to review the latter is still pending before the Supreme Court.
35. It transpired from the parties' pleadings and submissions, especially from oral submissions made during the hearing held on 19th September 2014, that Case RCC 21625 in which the Applicant requested the Supreme Court of Burundi to review its judgment delivered in RAA 669, is still pending before that Court.
36. During the hearing, when pressed to answer the question whether the Respondent could be faulted for not executing a decision that has been overturned by a subsequent decision of the Supreme Court, the latter decision being itself subject to

an application for review pending before the same Court, Counsel for the Applicant evasively stated that the case before the Supreme Court has been instituted following an "illegal procedure." We find, with respect, that this argument is untenable, the reason being that, if some procedural irregularities were committed in instituting the case, it was up to the Applicant to raise the matter before a court of competent jurisdiction in Burundi.

37. In view of the above Applicant and Respondent's averments, the only conclusion to be drawn is that there is no final and enforceable decision in the matter in issue. It then follows from this finding and in line with Article 30(1) of the Treaty that, although the Applicant does have locus standi as he need not exhaust local remedies before coming to this Court, his Reference did not disclose a cause of action as commonly defined to be "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" [see *Peter Anyang' Nyong'o case (supra)*].
38. Regarding therefore the question at issue, we are of the opinion that, since the Applicant has not disclosed any cause of action against the Respondent, there is no legal ground for the instant Reference and for this reason, violation of Articles 6(d) and 7(2) of the Treaty cannot arise.

    Issue No.2: Whether the Reference is time-barred

    Having found above that the Reference does not disclose any cause of action, and the latter matter being a point of law that can dispose of the entire Reference, it would be a futile exercise to entertain the issue of time-bar since it cannot arise while the Reference is no longer alive on substance.

    Issue No.3: Whether the Applicant is entitled to orders sought
39. The Applicant seeks the following declarations and orders:
    (a) A declaration that the refusal by the Respondent to pay damages to the Applicant is an infringement of Articles 6(d) and 7(2) of the Treaty;
    (b) A declaration that the Applicant has a full right to enjoy his vested interests without any prior conditions;
    (c) An order that the Applicant be paid the amount of BIF 1,720,516,000.00 by the Respondent;
    (d) Costs of this Reference to be paid by the Respondent.
40. Counsel for the Applicant submitted that the "Respondent, by a pure abuse of authority, refused to abide by its own national laws of Civil Procedure, and decided to engage by force the Applicant in an unlawful procedure of appeal instead of executing a judgment that has become definitive and enforceable"[sic]. He argued that, in so doing, the Respondent violated the principles of rule of law and good governance enshrined in Articles 6(d) and 7(2) of the Treaty. He then urged the Court to grant all the prayers sought in the Reference.
41. The Respondent's Counsel countered the Applicant's allegations by arguing that the matter forming the basis of this Reference is going through due process in the Supreme Court of Burundi and in accordance with the Laws of Burundi. He contended therefore that no violation of the Treaty was committed and that the Applicant is not entitled to the orders sought.
42. As found above, the Applicant did not adduce evidence that there has been a Treaty

violation imputable to the Respondent. Therefore, prayer (a) cannot be granted. As regards prayers (b) and (c), we are of the view, in agreement with the Respondent, that this Court does not have jurisdiction to grant them since they undoubtedly fall outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty

**Conclusion**

43. In light of our findings and conclusions on issues herein, we make the following declarations and orders:

Prayers (a), (b) and (c) are disallowed.

The Reference is therefore dismissed with costs to the Respondent.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 4 of 2013

**Henry Kyarimpa And The Attorney General of the Republic of Uganda**

Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J: Monica Mugenyi, J & Fakihi A. Jundu
November 28, 2014

*Balance of convenience – Compliance with municipal law in the context of the Treaty- Construction of Karuma Hydro Power Plant –Principles of good governance and rule of law- Transparency in bilateral arrangements- Whether a Memorandum of Understanding between Uganda and a company was inconsistent with the Treaty.*

*Articles 6, 7(2), 8(1) (c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community- Rule 24 of the EACJ Rules of Procedure, 2013- The Public Procurement & Disposal of Assets Act, No.1 of 2013, Uganda*

In 2013, the Government of Uganda requested for bids for the construction of the 600MW Karuma Hydroelectric Plant. The Applicant in his capacity as a procurement consultant aligned himself with M/S China International Water & Electric Construction Corporation ("China International") which placed a bid in line with the contents of tender documents. Before the award of the tender was made, the Inspector General of Government ("the IGG") received a complaint regarding the transparency of the tender process and after investigations, issued a report dated 22nd March, 2013 recommending that "the whole procurement process should be cancelled and the process repeated right from the beginning.

Subsequently, one Andrew Baryavanga Aja, instituted Judicial Review Misc. Application No. 11 of 2013 at the High Court of Uganda at Nakawa seeking *inter-alia* orders *inter-alia* that the Office of the IGG had overstepped its mandate in making the above recommendation and that the Permanent Secretary, Ministry of Energy and Mineral Development should be ordered to declare the best evaluated bidder of the procurement of services for the Karuma Hydroelectric Project. The orders were granted on 20th May 2015.

On 21st May 2013, the Government of Uganda signed the Memorandum of Understanding (MoU) with Sinohydro for the construction of the Karuma Hydroelectric Plant.

The Applicant, a procurement specialist challenged the process leading to the signing of the MoU as being inconsistent with and an infringement of the Treaty and the Public Procurement & Disposal of Assets Act, No.1 of 2013. Court orders had also been issued by the courts of Uganda in Misc. Appl. No.11 of 2013, Misc. Appl. No.162 of 2013 and Constitutional Application of No.3 of 2013 will also be addressed in the same context.

**Held:**

1) While Court's jurisdiction is limited to the interpretation and application of the Treaty. In doing so, the Court may have to look to municipal law and compliance thereto by a Partner State only in the context of the interpretation of the Treaty.
2) It was not the role of the Court to superintend the Republic of Uganda in its executive or other functions. However, where there was obvious and blatant violation or breach of the principles of good governance and rule of law, the Court would declare so. This was not so in the present case.
3) While conducting bilateral matters, Partner States must do so openly, transparently and within their Constitutions and Statutes. If they go outside those parameters, the principles of good governance and rule of law would be violated and this Court's intervention would be necessary.

**Cases cited:**

Kahoho v Secretary General of the EAC, EACJ Appl. No.5 of 2012
Muhochi v The Attorney General of the Republic of Uganda, EACJ Ref. No.5 of 2011
Plaxeda Rugumba v. Attorney General of Rwanda, EACJ Ref. No.8 of 2010

**Judgment**

**Introduction**

1. This Reference was filed on 26th June 2013 by Henry Kyarimpa, the Applicant herein, under the provisions of Articles 6, 7(2), 8(1) (c) , 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community (hereinafter "the Treaty") as well as Rule 24 of this Court's Rules of Procedure.
2. The Applicant is resident in the Republic of Uganda, a Partner State in the East African Community and was represented in the present proceedings by M/S Nyanzi, Kiboneka & Mbabazi Advocates of P.O. Box 6799, Kampala, Uganda. In his Reference, he described himself as a procurement consultant and specialist operating as such in Uganda.
3. The Respondent is the Attorney General of the Republic of Uganda and his address is Plot No.1, Parliament Avenue, P. O. Box 7183, Kampala, Uganda.

**Background**

4. The subject of the Reference is principally a challenge to the signing of a Memorandum of Understanding (MoU) between the Government of Uganda and M/S Sinohydro Corporation Limited (hereinafter "Sinohydro"), a Chinese Company, and whether the said MoU was shrouded in mystery, secrecy and manipulation by officials of the Government of Uganda. Further, the Reference is premised on a resolution of the issue as to whether the signing of the MoU was transparent, objective, fair and competitive and also whether it was full of illegalities, arbitrariness, discrimination and involved scheming by power brokers and influential members of the Government of Uganda. The specific issues to be determined as a result thereof, including the alleged refusal by the Government of Uganda to comply with Court orders, will be detailed out later

in this Judgment.

5. The history of the dispute before us can in any event be traced to the request, sometime in 2013, for bids by the Government of Uganda for the construction of the 600MW Karuma Hydroelectric Plant and its associated transmission lines. The Applicant in his capacity as a procurement consultant aligned himself with a company known as M/S China International Water & Electric Construction Corporation (hereinafter "China International") which placed a bid in line with the contents of a tender known as Ref. MEMD/WRKS/10-11/00099/ERD/EP for purposes of the Karuma Hydroelectric Project.
6. Before the award of the tender was made however, the Inspector General of Government (hereinafter "the IGG") received a complaint regarding the transparency of the tender process and after investigations, issued a report dated 22nd March, 2013 recommending that "the whole procurement process should be cancelled and the process repeated right from the beginning".
7. Subsequently, one Andrew Baryavanga Aja, instituted Judicial Review *Misc. Application No. 11 of 2013* at the High Court of Uganda at Nakawa seeking orders *inter-alia* that the Office of the IGG had overstepped its mandate in making the above recommendation and that the Permanent Secretary, Ministry of Energy and Mineral Development should be ordered to declare the best evaluated bidder of the procurement of services for the Karuma Hydroelectric Project. On 20th May, 2013, Hon. Lady Justice Faith Mwondha, after hearing all Parties to the Application, granted all the orders sought by Mr. Aja aforesaid.
8. On 21st May 2013, the Government of Uganda signed the MoU with Sinohydro for the construction of the Karuma Hydroelectric Plant and it is the process leading to the said MoU that is faulted through this Reference in the context of the Public Procurement & Disposal of Assets Act, No.1 of 2013 (hereinafter 'the PPDA Act') together with its Regulations. The import of the Court orders issued in *Misc. Appl. No.11 of 2013 and Misc.Appl. No.162 of 2013* as well as *Constitutional Application of No.3 of 2013* will also be addressed in the same context.

**The Applicant's Case**

9. The Applicant's case is contained in the Reference dated 24th June, 2013; his Affidavit in support sworn on the same day together with its annextures; the Written Submissions and List of Authorities filed on 28th March, 2014 and 8th April, 2014, respectively, and the Reply to the Respondent's Written Submissions filed on 2nd May, 2014. He also filed an Affidavit in support of the Reply to the Respondent's Response, sworn on 20th February, 2014 together with annextures thereof. His case is as summarized here below.
10. Firstly, that in selecting Sinohydro and signing the MoU without following the PPDA Act, the Government of Uganda acted in breach of and in violation of the principles of the rule of law, good governance, democracy and accountability as enshrined in Articles 6(d), 7(2) and 8(1) (a) and (c) of the Treaty. That the said action was i n fact arbitrary, discriminatory and illegal and lacked transparency since the governing legal framework for the procurement was ignored.
11. Secondly, that the selection of Sinohydro to undertake the project was done in

contempt of Court and in violation of the orders granted in the aforementioned cases and was thus a breach of the principles of the rule of law, good governance and democracy as stipulated in Articles 6(c) and (d), 7(2) and 8(1) of the Treaty.

12. The Applicant therefore prays for orders as follows:
    " a) A Declaration that the selection by the Government of Uganda and signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro Corporation Limited on the 20th June, 2013 for the construction of the 600 MW Karuma Hydro Power Project is a breach and infringement of Articles 6(c), 7(2) and 8(1) of the Treaty.
    b) Enforcing or directing the immediate compliance with the Treaty and/or performing of the State obligation and responsibilities of the Government of Uganda under the Treaty by:
        i) Directing the Government of Uganda to cancel the Memorandum of Understanding signed between the Government of Uganda and Sinohydro Corporation Limited on the 20th June, 2013 for the construction of the 600 MW Karuma Hydro Power Project;
        ii) Directing the Government of Uganda to comply with the Court Order in Nakawa High Court *Miscellaneous Cause No.11 of 2013* – Hon. Andrew Baryayanga Aja vs. Attorney General ordering award of the contract to the best evaluated bidder for the Engineering Procurement and Construction Contract for the 600 MW Karuma Hydro Power Project;
        iii) Reinstating the status quo before the selection of Sinohydro Corporation Limited and subsequent signing of the contract between the Government of Uganda and Sinohydro Corporation Limited.
    c) Costs of this Reference be paid by the Respondent."

**The Respondent's Case**

13. The Respondent filed a Response to the Reference on 10th September, 2013 as well as an Affidavit in support sworn by Christopher Gashibarake on the same day, together with annextures thereto. He also filed written submissions on 28th April, 2014. His case is that the Applicant is engaged in frivolous, vexatious, scandalous and outrageous litigation aimed at derailing and/or delaying the construction of the Karuma Hydro Power Plant.
14. That the Applicant's interest in the matter, in any event, is that of an agent who has not been paid for his services by his client and so his remedy for that problem lies elsewhere than in the present Reference.
15. Regarding the manner in which Sinodydro was awarded the contract to undertake the Karuma Project, it is the Respondent's case that:
    a) Upon the IGG recommending cancellation of the entire tender process, the Cabinet of the Government of Uganda decided to comply with that recommendation and on 23rd April, 2013, the Contracts Committee of the Ministry of Energy and Mineral Development rejected all bids for the tender under Section 75 of the PPDA Act and Regulation 90 thereof;
    b) The said cancellation was thereafter communicated to all the bidders, including China International, whose agent was the present Applicant;

c) On 24th April, 2013, the Constitutional Court of Uganda issued an injunctive interim order in *Misc. Appl. No. 3 of 2013* restraining the Government of Uganda from implementing the IGG's recommendations but the said order was served well after the cancellation of the procurement process and rejection of all bids. That thereafter, the proceedings in the Court were rendered spent and lifeless;
d) The same position in (c) above applied to the orders issued on 20th May, 2013 by Hon. Lady Justice Mwondha in *Misc. Appl. No.11 of 2013*;
e) That in any event, there is an appeal pending against the orders of Mwondha, J. and that fact notwithstanding, the said orders were also overtaken by events once the tender process was cancelled.

16. It was also the Respondent's case that the decision to select Sinohydro was neither arbitrary nor illegal and the same was carried out in a transparent manner and in uniformity with the provisions of the Constitution and Laws of Uganda. That the signing of the MoU with the said Company was also in line with a bilateral arrangement between the Government of Uganda and the Government of the People's Republic of China to secure funding through Exim Bank of China for the construction of the Karuma Hydro Electric Power Plant by Sinohydro, a wholly owned Government of China Company.
17. Lastly, that the MoU signed by Sinohydro is no different from the one signed by China International, the Applicant's principal, to construct the Isimba Hydro Power Plant and so the said Company cannot, through the Applicant, complain about a process that it is a beneficiary of.
18. That therefore, the Reference should be dismissed with costs.

The Applicant's Rejoinder to the Respondent's Case

19. In his rejoinder to the Respondent's case, the Applicant made the point that there is no lawful bilateral arrangement between the Governments of Uganda and that of the People's Republic of China as alleged, or at all. In any event, if such a bilateral arrangement existed, the same would have been unconstitutional by dint of Article 159 of the Constitution of Uganda which requires that all loan agreements by the Government must be executed as authorized by an Act of Parliament.
20. That a Cabinet directive as relied on by the Respondent cannot override a court order and the Cabinet of Uganda was bound to respect and abide by the decision made by Mwondha J. in *Misc. Application.No.11 of 2013*. Further, that the orders of maintenance of status quo issued on 22nd April, 2013 with the consent of the Respondent meant that the relevant Government authorities, including the Permanent Secretary, Ministry of Energy and Mineral Development, knew of the said orders and could not therefore change the status quo as they purported to do. In any event, that the Minutes of the Contracts Committee of the said Ministry purporting to cancel all bids for the Karuma Hydropower tender were fabricated and were an attempt at clothing an illegality with the garb of legitimacy.
21. The Applicant also contended that the award of the Isimba Hydro Power Project contract to China International could not make right the alleged unlawful MOU and contract with Sinohydro.
22. The Applicant also made the point that after the present Reference was filed, and in spite of the express provisions of Article 38(2) of the Treaty, the Government of

Uganda proceeded to authorize the commencement of the Karuma Hydro Power Project. That the said action was a perpetuation of its unlawful conduct and so the intervention of this Court is necessary.

23. That therefore, the Respondent's response has no merit and should be dismissed.

**Scheduling Conference**

24. On 13th February, 2014, Parties attended a Scheduling Conference at this Court and it was agreed *inter-alia* that the following issues are the ones requiring determination:
    i) Whether the selection and subsequent signing of the Memorandum of Understanding between the Government of Uganda and Sinohydro Corporation was inconsistent with and an infringement of Articles 6(c ) and (d), 7(2) and 8(1) of the Treaty for the Establishment of the East African Community;
    ii) Whether the acts of the Government of Uganda in implementing the Memorandum of Understanding after the filing of this Reference is inconsistent with and an infringement of Article 38(2) of the Treaty as amended; and
    iii) Whether the Parties are entitled to the orders sought.

**Determination**

25. As earlier stated, the whole dispute forming the gravamen of this Reference relates to the manner in which the Government of Uganda awarded the Karuma Hydro Electric Power Project contract to Sinohydro. As a corollary to that singular issue, the conduct of the said Government as regards certain orders issued by the Municipal Courts of Uganda will also have to be addressed. Alongside the latter issue, the import of Article 38(2) of the Treaty will be determined in the context of the facts as earlier set out.

    Issue No.1 - Whether the selection of Sinohydro and subsequent signing of the Memorandum of Understanding between the Government of Uganda and Sino Hydro Corporation was inconsistent with and an infringement of Articles 6(c ) and (d), 7(2) and 8(1) of the Treaty :

26. In order to address the above issue, it is important to reproduce the contents of Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty. They read as follows:

    Article 6(c) and (d)

    "The fundamental principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:

    (a) ….
    (b) ….
    (c) Peaceful settlement of disputes;
    (d) Good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' rights;"

    Article 7(2)

    "1…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."

Article 8(1) – The Partner States shall:

(a) Plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the provisions of this Treaty;

(b) Co-ordinated, throughout the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community; and

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

27. In invoking the above Articles of the Treaty, Mr. Mbabazi, Learned Counsel for the Applicant in his very elaborate submission on the concept and principles of good governance and accountability, quoted from a number of United Nations documents including those from United Nations Development Programme( UNDP ), UN Commission on Human Rights, United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) and United Nations Development Fund for Women(UNIFEM) as well as the World Bank and the International Fund for Agricultural Development(IFAD) to make the point that good governance concerns the principle that governance must be participatory, transparent and accountable. That it ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making processes.

28. On the principle of the rule of law, Mr. Mbabazi further relied on the decision of this Court in *Katabazi & 21 Others vs. Secretary General of the EAC & Anwar*, EACJ Ref. No.1 of 2007 where the Court explained the rule of law to mean that "both the ruled and the governed are equally subject to the same law of the land" and that the role of the Court is to maintain the rule of law and to ensure that Partner States also do so.

29. He also placed reliance on the decisions in *Smit Indira Nehru Gandhi vs. Raj Narain & Anor Air 1975 SRC 2299, HEABC vs. Facilities Subsector Bargaining Association 2004 BCSC 603 and Re Manitoba Language Rights (1985)*, SCR 7 to submit that the rule of law, unlike many legal concepts, is simple, is written in plain language and has a number of aspects, but the aspect with which this Court must concern itself with is that "the law in our society is supreme – no one –no politician – no government – no Judge – no union – no citizen is above the law."

30. Applying the above principles to the issue under consideration, Mr. Mbabazi's submission was that the conduct of the Government of Uganda in signing the MoU in contest breached all the principles of good governance and the rule of law, a position not shared by the Respondent as elsewhere explained above.

31. On our part, we wholly agree with the exposition of the above principles and specifically in Articles 6(c) and (d), 7(2) and 8(1) as eloquently expressed by others before us including in the *Katabazi Case (supra)*. In addition, we also wish to state that the framers of the Treaty and its signatories intended that the Principles in Articles 6 and 7 as well as the undertakings to implementation in Article 8 should have real value and meaning to themselves and to all citizens within the borders of the Partner States forming the EAC. They are therefore justiciable and are meant to bind all organs of the EAC including the Governments of the Partner States such as that of the Republic of Uganda.

32. In a nutshell, the activities of Partner States must be transparent, accountable and undertaken within the confines of both their municipal laws and the Treaty.
33. In the above regard, there is no doubt that the initial tender for the construction of the Karuma Hydro Power Plant was made within the provisions of the PPDA Act hence the fact that more than one bid was called for. The IGG later, in the Report dated 22nd March, 2013 recommended that the tender process be started afresh. We have perused the said report and the reason why the whole process was cancelled was the allegation that "…. One of the bidders, China International Water and Electric Corporation (CWE), was being fronted by architects of the procurement fraud and was on the verge of being awarded the contract, yet it had presented falsehoods in its bid documents which were known to the Procurement Committee but it had turned a blind eye to the falsehood because members of the Committee had been facilitated (bribed) by CWE."
34. The IGG indeed therefore found that China International had presented false information in its bid as regards its past experience and capacity as an Engineering, Procurement and Construction (EPC) contractor and recommended that action against the said Company be taken by the Public Procurement and Disposal of Assets Authority.
35. We shall only pause here to note that the Applicant has confirmed that he represented China International in the bid above and also to note that the above decision dated 22nd March 2013 was subsequently quashed by the High Court (Mwondha J.) on 20th May, 2013. We also note that on 24th April, 2013, the Constitutional Court of Uganda in *Constitutional Appl. No.3 of 2013* issued orders restraining "The Uganda Government/Ministry of Energy and Mineral Development/contracts Committee to the Ministry of Energy and Mineral Development/the Cabinet or any of its/their authorized servants/employees or any person by whatever name called from acting on the recommendations of the Inspector General of Government's (IGG) report …. dated 22/3/1013."
36. We have also seen letters dated 24th April, 2013 from the Permanent Secretary, Ministry of Energy and Mineral Development giving notice of the rejection of all bids and cancellation of the procurement for engineering, procurement and construction works of Karuma Hydro Power Project. The Respondent is shown to have received copies of those letters on 25th April, 2013. The letters were also addressed *inter-alia* to Sinohydro, China International Water and Electric Corporation and Orascam Construction Company Limited. The rejection and cancellation aforesaid was based on Section 75 of the PPDA Act which provides as follows:
    "The employer reserves the right to accept or reject any Bid and to cancel the bidding process and reject all bids, at any time prior to the award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action."
37. In the above context, we have not heard the Applicant to argue that the above section was improperly invoked but his case was that the decision to cancel the bids was taken in contravention of Court orders. We shall revert to the latter issue in due course but suffice it to say that the cancellation of the bids under section 75 aforesaid cannot be the sole basis for a Reference to this Court under the named Articles of the

Treaty. Had evidence been tendered before us that the Government of Uganda had expressly violated that section, then we may have rendered ourselves on the import of such a violation in the context of our jurisdiction to interpret the Treaty, including in matters relating to the rule of law and good governance under Articles 6(c) and (d), 7(2) and 8(1) (c) of the Treaty. That is all there is to say with regard to that matter.

38. The next issue to address is the actual selection of Sinohydro to undertake the Karuma Project and whether that action was an act in violation of the named Treaty provisions. To put matters into perspective, after the cancellation aforesaid, matters seemed to have remained largely in Court (both the High Court and the Constitutional Court) until the MoU with Sinohydro was executed on 26th June, 2013.
39. According to the Respondent, the decision to award Sinohydro the contract for the construction of the Karuma Hydro Power Plant was undertaken outside the PPDA Act unlike the cancelled tender, because it was based on a bilateral arrangement between the Governments of Uganda and that of the People's Republic of China. That argument is made at paragraph 6 of the Affidavit of Christopher Gashibarake but that bilateral arrangement was not attached to the said Affidavit in any format. Where then is the evidence of that arrangement in the present proceedings?
40. There are a number of references to the said arrangement in documents exhibited by the Parties and they are as follows:
    i) In the MoU dated 20th June, 2013, at Clause 8, the Government of Uganda and Sinohydro agreed as follows:
    "This MoU shall be subject to Sinohydro's producing a supporting letter regarding this project from the Chinese Government within the bilateral agreement between the Government of Uganda and the Chinese Government."
    ii) In a letter dated 3rd July, 2013, addressed to Sinohydro, the Permanent Secretary, Ministry of Energy and Mineral Development stated as follows:
    "You are also urged to expedite to the Government of Uganda the confirmation of support from your company by the Government of the People's Republic of China and the Exim Bank of China to avail funds for the project under the bilateral agreement between the two countries."
    iii) In a letter dated 15th August, 2013, the Executive Director of the Public Procurement and Disposal of Public Assets Authority wrote as follows to the Permanent Secretary, Ministry of Energy and Manpower Development :
    "The Authority has studied the contents of your letter and noted as follows:
    iv) The Memorandum of Understanding states that there is a bi-lateral agreement between the Government of Uganda and the People's Republic of China pursuant to which the Chinese Government offered to fund the construction of Karuma to be undertaken by a Chinese firm and that Cabinet approved another bi-lateral arrangements to utilize funds from China Exim Bank to construct the Karuma Dam, with counterpart funding from the Government of Uganda.
    v) There is an agreed position by the Presidents of Uganda and the People's Republic of China that the construction of Karuma dam be financed and developed under bi-lateral cooperation between Uganda and the People's Republic of China".

    In light of the above therefore, the Authority responds as follows:
41. The selection of M/S Sinohydro Corporation Ltd, a Chinese State owned Construction

Company was guided by Uganda's obligation arising out of the agreements between the Governments of Uganda and the People's Republic of China.

Under Section 4(1) of the PPDA Act, "where the PPDA Act conflicts with the obligations of the Republic of Uganda arising out of an agreement with one or more States or with an International Organization, the provision of the agreement shall prevail." It appears from your letter that the bi-lateral agreement between the Governments of Uganda and China has an arrangement whereby China Exim Bank will provide financing and M/S Sinohydro Corporation Ltd will undertake the works. This therefore means that the above bi-lateral arrangements prevail over PPDA Act, 2003 and in that regard, the Act does not apply to this type of procurement in view of the provisions of the various bi-lateral agreements mentioned in your above mentioned letter and the decisions taken by Cabinet in that regard.

With regard to your request to clear the draft conditional contract between the Government of the Republic of Uganda represented by the Ministry of Energy and Mineral Development and M/s Sinohydro Corporation Ltd in respect of Karuma Hydropower Plant and Karuma Interconnetion Project, the Authority advices that under Article 119 of the Constitution, the mandate for advising and clearing Government contract is vested in the Attorney General. The Entity should therefore seek clearance of the said contract from the Attorney General".

42. As can be seen above, in fact no written copy of the bilateral agreement or arrangement was seen by any of the named Parties before they gave advice or acceded to the MoU and in the contract agreement signed between the Government of Uganda and Sinohydro dated16th August, 2013, although Clause 2.0 is with regard to contract documents, the MoU is one such document but no reference is made to the bilateral agreement or arrangement nor any evidence of it given.
43. When we asked Mr. Bafirawala at the hearing of the Reference as to where the said agreement was, his response was:

    "My Lords, I do not have the physical document, but what I understand is that the arrangement does exist and it was reproduced in the documents that we attached and brought to the Court."
44. In further submission, Counsel for the Respondent intimated that the arrangement was actually made under Article 123 of the Constitution of Uganda and it was not necessary that it should have been reduced to writing.
45. Mr. Mbabazi for the Applicant on this issue asked the Court to take it that since no such arrangement was shown to have existed then the Sinohydro contract was based on an illegality. What position should we take in regard to that controversy?
46. It cannot be gainsaid that this Court's jurisdiction is limited to the interpretation and application of the Treaty. In doing so, there may be instances where the Court may have to look to municipal law and compliance thereto by a Partner State only in the context of the interpretation of the Treaty. That is why for example, in *Rugumba vs. Attorney General of Rwanda, EACJ Ref. No.8 of 2010*, this Court had to invoke the penal laws of the Republic of Rwanda to find that where a Partner State does not abide by its own penal laws and procedures, then its conduct amounts to a violation of the rule of law and hence the Treaty.
47. Similarly, in *Muhochi vs. the Attorney General of the Republic of Uganda, EACJ Ref.*

*No.5 of 2011*, the Court found that where a Partner State had declined to follow its immigration Laws in declaring the Applicant a prohibited immigrant, then it was in breach of the Treaty and the Protocol on the Common Market which includes the right of free movement of persons within the EAC.

48. We shall adopt the same approach in this matter and we agree with Mr. Mbabazi only to the extent that the alleged bilateral agreement or arrangement does not exist before us in any written form. But having said so, we heard Mr. Bafirawala for the Respondent as supported by his colleague, Mr. Adrole, to have been saying that under Article 123(1) of the Constitution of Uganda, the President of Uganda could "make treaties, conventions, arrangements or other agreements between Uganda and any other country or between Uganda and any international organization or body in respect of any matter".
49. Article 123(2) however, provides that Parliament shall make laws to govern the matters provided for in Article 123(1) aforesaid and one of those laws, in the context of the dispute before us, is the PPDA Act.
50. That Article must therefore be read with Section 4(1) of the PPDA Act which ousts the provisions of that Act and for avoidance of doubt, we once again reproduce that section which reads as follows:
"Where the PPDA Act conflicts with the obligations of the Republic of Uganda arising out of an agreement with one or more States or with an International Organization, the provision of the agreement shall prevail"
51. Turning back therefore, to the bilateral arrangement and the selection, without a tender process, of Sinohydro to undertake the Karuma Hydro Power Project, did the Government of Uganda follow its own Laws in the said selection?
52. Taking all matters above into account, the bilateral arrangement may not be with us in writing but we have reflected over that fact and noting the terms of the contract signed on 16th August, 2013 as read with the MoU dated 20th May, 2013, it is clear to us that an arrangement under Article 123(1) of the Ugandan Constitution exists between the Government of Uganda and the People's Republic of China whereby the latter, through its subsidiaries and agencies, would finance projects in Uganda on such terms as may be agreed between them. We say so because, it is inconceivable, to us at least, that the President, the Attorney General, the Permanent Secretary in the relevant Ministry, the Executive Director of the PPA would all refer to "an arrangement" that does not exist. We have also noted that the obligation to produce evidence of such an arrangement in the context of the dispute before us was placed on Sinohydro. It is on the record that Sinohydro was initially a party to these proceedings but was struck out for being improperly joined. How then can we hold the Respondent responsible for actions of a party not present to speak for itself? We reiterate that Clause 8 of the MoU enjoined Sinohydro in the following terms:
"This MoU shall be subject to Sinohydro's producing a supporting letter regarding this Project from the Chinese Government within the bilateral arrangement between the Government of Uganda and the Chinese Government."
53. Although it would have been expected that the Respondent should have produced evidence of compliance by Sinohydro, we find it difficult to hold it against him that he has not done so in the context of the dispute before us.

54. Having held as above, we can only conclude by stating that it is not the role of this Court to superintend the Republic of Uganda in its executive or other functions. Whereas of course where there is obvious and blatant violation or breach of the principles of good governance and rule of law, this Court will, without hesitation, so declare, we are unable to do so in the present case.
55. The next issue to address is whether the Respondent disobeyed and committed contempt of Court when it failed to honour and enforce the Court orders issued in Misc. Appl. No.162 of 2013, Misc. Appl. No.11 of 2013 and Constitutional Appl. No.3 of 2013. The question was framed in the context of alleged violations of Articles 6 (c) and (d), 7(2) and 8(1) of the Treaty.
56. We propose to spend very little time on this question because as we understand it, the Applicant alleged that the Respondent committed acts of contempt of the High Court and Constitutional Courts of Uganda by selecting Sinohydro to undertake the Karuma Hydro Power Project while there were orders that the status quo as regards the project be maintained alongside other orders of an injunctive nature restraining the award of the contract to any party, Sinohydro included.
57. The Respondent denied the above allegation and added that all the orders issued by the Court aforesaid were rendered lifeless and spent once the tender process was cancelled well before the said orders were served on the Respondent.
58. More fundamentally, and that is our entry point in determining the above issue, the Respondent submitted that this Court cannot find contempt when the affected Courts have not done so. We have no choice but to agree with the Respondent in that regard.
59. We say so because, contempt of Court has been defined to mean "conduct that defies the authority or dignity of a Court…." – *Black's Law Dictionary, Ninth Edition*. If that be so, the law and practice as we know it, is that contempt proceedings are in the nature of criminal proceedings and ordinarily an enquiry ought to be made as to the circumstances in which the alleged contempt was committed. Issues of service of the Court order, its contents and manner in which it was allegedly contravened are then addressed by the Court that issued the said orders. In the instant Reference, we have seen no evidence that either the High Court or the Constitutional Court of Uganda were ever addressed on alleged disobedience of their orders. How then can this Court take their place and purport to determine that those orders were disobeyed or not, when the said Courts have not received any complaints in that regard?
60. Whatever our view on the orders issued by the said Courts and whether or not they were disobeyed is a matter that we deem unfit to delve into lest we fall afoul of our jurisdiction. Had those Courts found the Respondent to have acted in contempt of their orders, then this Court could properly take that decision and apply it in determining whether the Respondent by that fact had also acted in contravention of the principle of the rule of law under the Treaty.
61. Having declined the invitation to address the issue of contempt of a court other than contempt committed in this Court, it follows that we have nothing more to say on the subject.
62. Issue No.1 must in conclusion be answered in the negative.
    Issue No.2 - Whether the acts of the Government of Uganda in implementing the Memorandum of Understanding after the filing of this Reference is inconsistent with

and an infringement of Article 38(2) of the Treaty:

63. The Applicant's submission on the above issue was that after the Reference was filed, the Respondent ought to have advised the Government of Uganda not to proceed with the implementation of the impugned MoU with Sinohydro because of the express provisions of Article 38(2) of the Treaty.
64. The Respondent on the other hand submitted that Article 38(2) aforesaid is not an automatic bar to any action being challenged in a Reference before this Court and relied on the decision of this Court in *Kahoho vs. the Secretary General of the EAC, Appl. No.5 of 2012* in support of that proposition.
65. On our part, we should begin by stating that Article 38(2) of the Treaty provides as follows:
"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 to the resolution of the dispute or might aggravate the dispute."
66. In interpreting that Article, in the *Kahoho case (supra)*, this Court partly stated that:
"As for the provisions of Article 38(2) of the Treaty, we hold the view that every case should be determined on its own facts since the grant of an injunction is a function of the Court in exercise of its discretionary power. Therefore, Article 38(2) cannot be seen to be removing that long held position without expressly saying so".
67. In applying the above reasoning to the present Reference, we note that the Applicant obtained status quo orders as well as injunctive orders against the Respondent in both the High Court and the Constitutional Court of Uganda.
68. He also sought injunctive reliefs in this Court premised on Article 38(2) aforesaid. We have declined to delve into the issue whether the orders of the Ugandan Courts were disobeyed and our reasons for doing so are on the record. As regards interlocutory proceedings before this Court filed by the Applicant in Appl.No.3 of 2013 during the pendency of the Reference, we noted as follows:
"We have considered the matter before us in totality and whatever the merits or otherwise of the Applicant's case, the construction of Karuma Hydro Power Plant has already commenced. Funds have certainly been pumped into it and the consequences of stoppage may not be bearable to the tax payer in Uganda.
Further, a number of parties have been named as having an interest in this matter but they are not before us. They include the principle player in the offending MoU, namely Sinohydro as well as China International and Exim Bank, China. To issue orders that may affect them adversely without hearing them would not enhance the rule of law and would instead violate it. In the end and with extreme reluctance, we are minded to the position that the balance of convenience must tilt in favour of the Respondent.
In saying so, we are aware that the grant of an interlocutory injunction is an exercise the Court's discretion which must be exercised judiciously at all times. (see *Kahoho vs. Secretary General of the EAC, EACJ Appl. No.5 of 2012*).
69. This Court having so stated, then declined to grant any orders to stop the implementation of the MoU as sought by the Applicant and premised on article 38(2) aforesaid.
70. We reiterate that finding as we also reiterate the reasoning in *Kahoho (supra)*. To

reason otherwise would open up the Court process to abuse whereby a party intent on disrupting an otherwise legitimate process would merely have to file a reference before this Court and relying on Article 38(2) of the Treaty, obtain an automatic stay of the process or action without the responding party being heard. The principle of the rule of law so painstakingly crafted into the Treaty would in such circumstances, have no meaning.

In the circumstances, we can only answer Issue no.2 in the negative.

Issue No.3 - Whether the Parties are entitled to the Orders sought:

71. Elsewhere above we have reproduced the prayers sought in the Reference. Prayer (a) sought orders that this Court should direct the Government of Uganda to cancel the MoU signed with Sinohydro. We have shown that we see no merit in such an action and in addition, whereas it is a principle well established in this Court, that a party need not exhaust local remedies before coming to this Court, the same issue is live before Courts in Uganda and taking the same approach as we did in *Alcon Intl. Ltd vs. Standard Chartered Bank of Uganda & others, EACJ Reference No. 6 of 2010*, we respectfully decline to grant the said orders and would advise the Applicant that all is not lost and he should pursue the pending matters in the local Courts to their logical conclusion.
72. On prayer (b) seeking orders that the Government of Uganda should be directed to comply with the status quo orders issued in *Misc. Appl. No.11 of 2013* at the High Court of Uganda in Nakawa, we have already addressed that issue and we need not repeat our findings.
73. The holding in (b) above also applies to prayer (c) of the Reference which we also decline to grant.
74. On costs, the issues raised by the Applicant were neither idle nor frivolous to the extent that they raise pertinent issues about the manner in which a Partner State should undertake its public procurement processes. The record would show that he was pursuing the said issues for both personal reasons and in the interest of the Uganda public which is entitled to fair, transparent and accountable procurement processes and the latter is a sufficient reason for us to order that each Party should bear its own costs.

**Conclusion**

75. The Reference before us brings to the fore the emerging reality within the Community that Partner States, while conducting bilateral matters, must do so openly, transparently and within their Constitutions and Statutes. To go outside those parameters may well mean that the principles of good governance and rule of law would be violated and this Court's intervention would be necessary.
76. Having come to the end of the matter, we thank Counsel for their courtesy and depth of research but it is clear by now that we are unable to accede to the Applicant's prayers and the final orders to be made are that:
    i) The Reference is dismissed;
    ii) 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.5 of 2013

**Godfrey Magezi And The Attorney General of the Republic Uganda**

Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J
May 14, 2015

*Attorney General's mandate - ARV procurement - Good governance and accountability - Jurisdiction- Natural justice - Whistle blower's motivation - Whether this was a matter of interpretation by the Court.*

*Articles: 6(d), 7(2),8(1)(c ) 27 (1), 30(1) & (3) of the Treaty for the establishment of the East African Community- Whistle-blowers Protection Act, No.6 of 2010, Uganda- The Inspectorate of Government Act, 2002 , Uganda Constitution, 1995.*

The Applicant a resident of the Republic of Uganda claimed that in 2009 he obtained information that the Government of Uganda, through the National Medical Stores procured Antiretroviral drugs (ARVs) under a Memmorandum of Understandin (MoU) of 14th December, 2005 between the Government of Uganda and Quality Chemical Industries Ltd (QCIL) at non-competitive prices contrary to the spirit of the Public Procurement and Disposal of Public Assets Authority Act (PPDA) and Regulations governing Public Procurements.

He disclosed the information to the Inspector General of Government (IGG) in accordance with the provisions of the Whistle-blowers Protection Act, No.6 of 2010. The investigation by the IGG led to the conclusion of a loss by the Government of Uganda of USD17,826,038.94 between December, 2009 and October, 2010 due to inflated prices and the IGG made recommendations on the appropriate action to be taken by the Government contained in the IGG's Report of 20th December, 2011. In accordance with Section 1 of the Whistle-blowers Protection Act, the Applicant as a whistle-blower expected a reward of 5% of the net liquidated sum of money upon the disclosure to the IGG provided for in both the Whistle-blowers Protection Act and Inspectorate of Government Act, 2002.

On 22nd October, 2012, the Applicant sought an update from the IGG on the implementation of the IGG's recommendations and the reward provided for under the Whistle-blowers Protection Act. By a letter dated 14th December 2012, the IGG advised the Applicant to approach the Attorney General of Uganda who, in his legal capacity of legal representative of Government, has the obligation and necessary resources to implement the IGG's recommendations and to satisfy the Applicant's Claim. The Respondent did not take appropriate action with regard to the implementation of the IGG's report and recommendations and on 8th July, 2013, the IGG overturned her recommendations and considered that there was no need to recover the amount of USD17, 826,038.94.

The Applicant then filed this Reference challenging the legality of the actions of the Respondent alleging that the turnabout by the Inspectorate of the Government was inconsistent with Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

The Respondent averred that the Reference had no merit and there were no questions for the interpretation or infringement of the Treaty.

**Held:**

1) The Court would not interfere with the report of the Inspector General of Government (IGG) because it lay outside the province of its jurisdiction. However, the mere inclusion of some aspects of the IGG's report in the Reference could not prevent the Court from exercising its jurisdiction where the Applicant alleged that the actions of the Respondent had violated Treaty provisions. Thus the Reference was properly before the Court.
2) Adverse orders could not be made against QCIL without hearing it as this would be against the principle of natural justice.
3) On the issue of the consistency of letters of the IGG and Attorney General of the Republic of Uganda with Articles 6(d), 7(2) and 8(1)(c) of the Treaty, the Attorney General acted within the legal framework and his actions were not inconsistent with the rule of law. The Attorney General's legal opinion to the IGG was merely advisory and did not have a binding effect. Hence, the IGG acted independently in accordance with her constitutional mandate.

**Cases cited:**

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

Jim Muhwezi & 3 Others v. Attorney General and Another, Constitutional Petition No.10 of 2008.

Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda, EACJ, Reference No.5 of 2011

Shri Mani Ram Sharma and Others No.001322 v. the Attorney General of India on 10th December, 2012 Supreme Court of India

**Judgment**

**Introduction**

1. Mr. Geoffrey Magezi (hereafter "the Applicant") is a resident of the Republic of Uganda, a Partner State of the East African Community (hereinafter referred to as "EAC"). His address of service for purposes of this Reference is c/o Nyanzi, Kiboneka & Mbabazi Advocates, Plot 103 Buganda Road, P.O. Box 7699, Kampala.
2. On 25th July, 2013, the Applicant brought this Reference under Articles 6(d), 7(2), 8(1)(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community (hereinafter referred to as "The Treaty") and Rule 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as "Rules"). He has sued the Attorney General of the Republic of Uganda in his capacity as the Chief Legal

Adviser to the Government as the Respondent, the Inspector General of Government, the Auditor General of Uganda, the Public Procurement and Disposal of Public Assets Authority (PPDA), the National Medical Stores and Quality Chemical Industries Ltd (QCIL), as Interested Parties, for violation and/or infringement of Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

3. On 25th November, 2013, he lodged before this court an Amended Statement of Reference in which he discontinued the Reference against the Interested Parties and confirmed the judicial proceedings against the Attorney General only.

**Representation**

4. Mr. Mohamed Mbabazi, represented the Applicant while Mr. Kodoli Wanyama, Principal State Attorney, George Karemera, Senior State Attorney, and Mr. Bichachi Ojiambo, State Attorney represented the Respondent

**Factual Background**

5. At a time when in Uganda access to the treatment of HIV/AIDS was almost impossible to the poor and malaria was at its peak, the Government of Uganda (the "Government") conceived the establishment of a pharmaceutical factory to manufacture drugs to treat illnesses in that country. Therefore, the Government and QCIL, a Private Limited Company incorporated in accordance with Ugandan Laws and Regulations, signed a Memorandum of Understanding (The "MoU") on 14th December, 2005, under which the off-take purchase of Antiretroviral ("ARVs") and anti-malaria drugs from QCIL by the Government was guaranteed until 2019. A guarantee to QCIL was also issued on the same date and both the MoU and the Guarantee provided that QCIL shall construct a pharmaceutical drugs and products factory which shall carry out the manufacture of ARVs and Anti malaria drugs.
6. The MoU provided that the Government shall purchase the drugs from the QCIL Plant in Uganda before the construction of the factory was completed and the drugs manufactured. Moreover, it was agreed that the prices of those drugs would be equal to or less than the prices provided in a joint UNICEF-UNAID-WHO-MSF Project.
7. Prior to the completion of the construction of the aforesaid factory in 2007, the Applicant alleged that he discovered that the Government, through the National Medical Stores had procured drugs from QCIL imported from India and which were at an unjustified 15% mark-up of international prices and that this act had caused a financial loss of USD17,826,038.94 to the public. The Applicant also alleged that acting as a whistle-blower, he brought that malpractice to the attention of the Inspector General of the Government (hereinafter referred to as "the IGG") who started investigations and produced a report that confirmed the said loss.
8. In her report, the IGG recommended to the Government to consider recovery of the payments made above the 15% mark-up for drugs purchased illegally from QCIL, which amounted to USD17,826,038.94.
9. Whereas the Applicant expected a reward in accordance with Article 19 of Whistle-blowers Protection Act, 2010 and in the light of the conclusions and recommendations of the IGG, the latter, by a turnabout, reviewed her conclusions related to the recovery of the alleged loss highlighted in the aforesaid report, hence the filing of this Reference.

**The Applicants' Case**

10. The Applicant's case is contained in his Amended Reference, his reply to the Respondent's Response filed on 20th May, 2014, his Affidavit sworn on 17th June, 2014, his written submissions filed on 17th November, 2014 and his rejoinder to the Respondent's submissions filed on the 12th January, 2015. In summary, the Applicant's case is as follows:-
    - In the course of the year 2009, the Applicant got information alleging that the Government of Uganda, through the National Medical Stores procured ARVs under the MoU dated 14th December, 2005 between the Government of Uganda and QCIL at non-competitive prices contrary to the spirit of the PPDA and Regulations governing Public Procurements;
    - On 25th April, 2010, the Applicant instructed his Lawyers to gather all the information pertaining to all procurements made by the National Medical Stores from QCIL. Thereafter, and upon receipt of the information required, the Applicant analysed price information in the procurement and discovered irregularities in the implementation of the MoU between the Government and QCIL Ltd. He then disclosed the information to the Inspectorate of Government in accordance with the provisions of the Whistle-blowers Protection Act, No.6 of 2010. Later on, the Inspectorate acknowledged the Applicant's disclosure and pledged that it would investigate and take appropriate action. The disclosure touched on acts of corruption, abuse of office, misappropriation, illicit enrichment, plunder and wastage of government resources by the Government of Uganda and/or its officials, servants and agents in complicity with QCIL;
    - The investigation by the IGG led to the conclusion of a loss by the Government of Uganda of USD17,826,038.94 in four transactions carried out between December, 2009 and October, 2010 due to inflated prices and thus the IGG made recommendations on the appropriate action to be taken by the Government in redress of the malpractices and illicit transactions contained in the IGG's Report;
    - Following the report issued on 20th December, 2011 and in accordance with Section 1 of the Whistle-blowers Protection Act, the Applicant as a whistle-blower expected a reward of 5% of the net liquidated sum of money upon the disclosure to the IGG. Both the Whistle-blowers Protection Act and Inspectorate of Government Act, 2002 provide for such a reward;
    - On 22nd October, 2012, the Applicant wrote to the IGG seeking an update on the implementation of the IGG's recommendations and more specifically the reward provided for under the Whistle-blowers Protection Act. In her response dated 14th December 2012 to the Applicant, the Inspector General of Government advised the Applicant to approach the Attorney General of Uganda who, in his legal capacity of legal representative of Government, has the obligation and necessary resources to implement the IGG's recommendations and to satisfy the Applicant's Claim;
    - In the light of the above advice, the Applicant wrote to the Attorney General requesting to be updated on the status of the implementation of the IGG's report and recommendations but todate, the Attorney General has never responded to that letter. Instead, the Applicant discovered various letters with contradictory

positions in regard to the aforesaid implementation and no appropriate action has so far been taken with regard to the implementation of the IGG's report and recommendations;

- Later on by letter dated 8th July, 2013, the IGG overturned her recommendations and considered that there was no need to recover the amount of USD17,826,038.94. The Applicant alleged that, the turnabout by the Inspectorate of the Government is inconsistent with Articles 6(d), 7(2) and 8(1)(c) of the Treaty; and
- Finally, the Applicant has sought the declaratory Orders as set out in the Amended Reference.

**The Respondent's Case**

11. The Respondent's case is contained in his Response to the Amended Reference filed on 7th February, 2014 supported by the Affidavit sworn by one, Richard Kiggundu, Finance Manager of the QCIL on 11th July, 2014 and the Affidavit dated 29th July, 2014 sworn by one Ms. Jane Aceng, the Director General of Health Services in the Ministry of Health, in the Republic of Uganda and mainly in his written submissions filed on 23rd December, 2014.
12. In a nutshell, his case is as follows:-
    - A MoU and a Guarantee between the Government of Uganda and QCIL Ltd was signed on 14th December, 2005 and amended on 16th April, 2012;
    - The Applicant indeed made a disclosure of alleged malpractices that occurred between the National Medical Stores and QCIL Ltd;
    - The IGG carried out investigations and produced a report on 20th December 2011;
    - In the follow-up of the recommendations made by the Inspectorate of Government Unit, the IGG sought an update on the implementation of the recommendations and the Attorney General of Uganda on 12th April, 2012 and 27th May, 2013 issued two legal opinions stating in particular that there was no loss caused to Government by the supply of ARVs, ACTs and other drugs by QCIL Ltd;
    - The Attorney General, by issuing his legal opinion, acted within his constitutional powers and that cannot be said to have contravened the principles of good governance, democracy and rule of law;
    - The Attorney General independently and within his constitutional mandate analysed all relevant facts in the report and shared his conclusions with the IGG. He then evaluated the IGG's recommendations for their appropriate implementation;
    - The IGG does not require any consent or approval of any authority to discontinue proceedings as provided under Section 14(8) of the Inspectorate of Government Act, 2002;
    - The Attorney General exercised his constitutional mandate in issuing the aforesaid legal opinion and in doing so, he neither altered the IGG's report nor influenced the Inspectorate of Government;
    - The Respondent would raise a preliminary objection as to whether matters in the Reference are proper questions for the interpretation or infringement of the Treaty; and
    - The Reference has no merit and should be dismissed.

**Scheduling Conference**

13. On 3rd June, 2014, a Scheduling Conference was held by the Court where Parties appeared and the following were designed as points of disagreement or issues for determination:-
    i) Whether this is a matter of interpretation before this Honourable Court pursuant to Articles 27(1), 30(1) and (3) of the Treaty;
    ii) Whether this Honourable Court can find against an entity that is not a Party to this Reference and specifically Quality Chemical Industries Ltd;
    iii) Whether the content and the implications of the Inspectorate of Government's letter dated 8th July, 2013 was in breach of Principles of good governance, rule of law, accountability and transparency contrary to the provisions of Articles 6(d), 7(2) and 8(1)(c ) of the Treaty;
    iv) Whether there was any loss of USD17,826,038.94 by the Government of Uganda and Quality Chemicals Limited;
    v) Whether there was inaction, refusal/or failure by the Government of Uganda to recover USD17,826,038.94 from Quality Chemical Industries Limited; and
    vi) What reliefs are available to the Parties?

**Determination of the Issues**

14. We have considered the Reference in the context of the pleadings and Submissions made by the Applicant and Respondent, and here below we now address the issues in contention.
15. In doing so, we have in mind that the two first issues were raised as preliminary objections by the Respondent. Since those issues have been distilled as issues for determination, we think it is prudent to address them one by one as they were agreed upon during the Scheduling Conference.
    Issue No.1: Whether this is a Matter for Interpretation before this Honourable Court pursuant to Articles 27(1) and 30(1) & (3) of the Treaty:
16. First and foremost, surprising as it may be, the Applicant shied away from submitting on the above issue in his written submissions, but rather, he opted to await and counter the written submissions thereof by the Respondent since he is the one who raised that issue as a preliminary objection.

**The Applicant's Submissions**

17. The Applicant, when he finally addressed the Court on this issue in his Rejoinder to the Respondent's written Submissions, submitted that the jurisdiction and mandate of the Court is clearly stated in the Treaty and that in the context of the Reference, the Court is under obligation to determine whether the acts of the Attorney General of Uganda and the IGG, through their respective letters breached Treaty provisions. The Applicant added that it was for that reason that he challenged the legality of the acts of the IGG through his letter dated 8th July, 2013.
18. In conclusion, the Applicant submitted that the preliminary objections should be dismissed and he invited the Court to answer the said issue in the affirmative.

**The Respondent's Submissions**

19. In his Response to the Amended Reference, the Respondent on his part contended that he would raise a preliminary objection to the extent that the matters complained of by the Applicant are not issues for interpretation by this Court. Instead, that the facts complained of are questions to do with interpretation of a contract between two Parties which is a preserve of the National Courts.
20. Through his written Submissions filed on 23rd December, 2014, the Respondent submitted that the Reference does not contain any question for interpretation, or infringement of Treaty provisions and went as far to argue that the Applicant is challenging the powers of the IGG and the Attorney General of Uganda provided for under Articles 119 and 225 of the Constitution of Uganda which is outside the jurisdiction of this Court.
21. It was the Respondent's further submission that the Applicant has attempted to use the Court as an Appellate Court to overrule the decisions of the Inspectorate of Government and the Attorney General's legal opinion which is an abuse of process of Court as provided under Rule 47(c) of the Rules. The Respondent further argued that the facts challenged by the Applicant did not demonstrate a prima facie case of any breach of the Treaty by the Republic of Uganda or any cause of action under the Treaty.
22. In conclusion, the Respondent cited the Cases of *Modern Holdings limited vs. Kenya Ports Authority, EACJ Reference No.1 of 2008 and James Katabazi & 21 Others vs. The Secretary General of the EAC and The Attorney General of the Republic of Uganda Reference No.1 of 2007* in support of his Submissions and prayed that Issue No.1 be answered in the negative.

**Determination on Issue No.1**

23. The above issue is: Whether this is a Matter for Interpretation before this Honourable Court pursuant to Articles 27(1) and 30(1) & (3) of the Treaty. Put another way; whether this Court has jurisdiction to entertain the Reference in accordance with the aforesaid Articles. At the outset, and for the sake of clarity, we hereunder reproduce Articles 27 (1), 30(1) & (3) of the Treaty.
24. Article 27(1) reads as follows:-
    "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."
25. At this juncture, we may pause and ask ourselves whether the terms of this Article as they are framed need further clarification. It is common knowledge that this Court is vested with jurisdiction over interpretation and application of the Treaty save for the proviso enshrined in the above Article.
26. Article 30 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. .....
3. 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."

27. To dispel any misunderstanding among the Parties, let us spell out from the Articles the conditions for any person to bring a Reference before this Court. Any plain reading of the aforementioned Article underscores that prior to submitting a Reference before the Court, any person must meet the following conditions:-
    a) Be a legal or natural person; and
    b) Be resident of an EAC Partner State; and
    c) Is challenging the legality of any Act, regulation, directive, decision, and action of the said Partner State or an institution of the Community.
28. Having said so, what are the matters challenged in the Reference by the Applicant? The Applicant is seeking the interpretation of the Treaty as to whether the letter of the IGG dated 8th July, 2013, as well as the legal opinions of the Attorney General dated 12th April, 2012 and 27th May, 2013 infringed Articles 6(d), 7(2) and 8(1)(c ) of the Treaty.
29. At this stage, Mr. Godfrey Magezi is indeed, a natural person, a resident of Uganda, and the Republic of Uganda is a Partner State in the meaning of Article 1 of the Treaty and the Applicant is challenging the legality of the actions of the Attorney General and IGG of Uganda through their aforesaid letters.
30. With respect to the Respondent, it is our view that the matters raised in the Reference do meet the requirements laid down in the above Articles and as to whether the Reference is well or ill-founded is immaterial at this point.
31. Previously, this Court has on constant objections as to lack of jurisdiction held and invariably so in J*ames Katabazi & 21 Others vs. the Secretary General of the EAC and The Attorney General of the Republic of Uganda, EACJ Reference No.1 of 2007 and in Samuel Mukira Mohochi, Reference No.5 of 2011* that it has jurisdiction over interpretation of the Treaty.
32. In *Mukira Mohochi*, the Court found that:-
    "….. This Court does have jurisdiction to interpret and apply any and all provisions of the Treaty save for those excepted by the provisions to Article 27."
33. Further, in the same judgment, the Court added that:-
    "……..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."
34. From the aforegoing, we are of the firm view that since there is before us a person who can sue and another who can be sued and that, once all alleged acts are placed before us for interrogation as has happened in this Reference, then a cause of action has arisen.
35. With regard to Article 30(3) of the Treaty in relation to the mandate of the Inspectorate of Government of Uganda, we hasten to say that this Court is not going to interfere

in any way with the report of the IGG because it lies outside the province of our jurisdiction.

36. However, the mere inclusion of some aspects of the IGG's report in the Reference cannot prevent the Court from exercising its jurisdiction where the Applicant alleges that the actions of the Respondent have violated Treaty provisions.
37. In view of the foregoing, we find and hold that the Reference is properly before this Court.

    Issue No.2: Whether this Honourable Court can find against an entity that is not a Party to this Reference and specifically Quality Chemical Industries Limited:
38. Prior to the Amended Statement of Reference being filed, QCIL was one of the five Interested Parties. Upon the amendment of the Reference, QCIL ceased to appear as such and now the question is whether the Court can make decisions which are to affect a party which did not participate in the proceedings. In his rejoinder dated 12th January, 2015, the Applicant on this issue submitted that:-
    - There is no Reference against QCIL and consequently, the Court cannot find against a non-Party;
    - The finding of the Court that would affect QCIL is the issue of the loss of USD17,826,038.94 which in the Applicant's Submissions is not justiciable before this Court;
    - The mandate of the Court is to interpret the contents of the letter dated 8th July, 2013 and inaction of the Attorney General of Uganda to implement the IGG's recommendations;
    - The recovery of the aforesaid sum of money is not sought from the Court, but rather to determine whether the purported recovery and/or inaction and failure to recover by the Government is inconsistent with Articles 6(d), 7(2) and 8(1) (c) of the Treaty;
    - The Respondent in his submissions has not shown clearly how QCIL would be affected by the Court's findings and the submissions are purely speculative;
    - In conclusion, the Applicant invited the Court to interpret and make declaration that, the acts and inaction of the Respondent in the context of the violation of the Treaty and dismiss the objection framed in Issue No.2.

**The Respondent's Submissions**

39. The Respondent submitted on Issue No.2 that it would be unfair and a violation of the principles of natural justice to find against a third party; not party to the Reference. He further argued that a fair and impartial trial would involve a hearing by an impartial and disinterested tribunal, the right to be present or be represented by an advocate, to present its defence supported by evidence. In support of his submissions, he cited *Modern Holdings (EA) Limited Vs. Kenya Ports Authority EACJ Reference No.1 of 2008, Carolyne Turyatemba & 4 Others Vs. Attorney General and Another, Constitutional Petition No.15 of 2006 and Kampala Bottlers vs. Damanico (U) Ltd Supreme Court Civil Appeal No.22 of 1992.*
40. In conclusion, the Respondent invited the Court to adopt the authorities cited and apply them to the above case, and answer the Issue No.2 in the negative.

**Determination on Issue No.2**

41. The question sends us back to the Principle of natural justice based on a fair hearing in any judicial proceeding. It follows that any party to a judicial proceeding has a fundamental right to be informed of a proceeding against him or her and to consider, challenge or contradict any evidence in that proceeding.
42. On 17th February,2015 when the Court heard this Reference, the Applicant highlighted his written submissions and conceded on that issue by saying:-
"Correct my Lords, but I had already put a rider in the beginning of that issue, one is irrelevant and diversionary."
43. In his rejoinder, the Applicant clearly adopted the authority of *Carolyn Turyatemba [supra]* and averred that it favoured him. The relevant finding held by the Constitutional Court is that:-
"……. it is incompetent in respect of those reliefs, which if granted, would affect the interests of the third Parties in the suit lands, yet the third Parties are not Parties to this Petition."
44. The principles of fairness and natural justice abhor finding against a party which has not been given an opportunity to present its case. In fact, the above principles comprise among others:-
    - The right to be informed of charges;
    - The right to a fair hearing; and
    - The right to be given an opportunity to defend his/her case personally or to be represented.
45. In light of the above principles, to make any adverse order against QCIL without hearing it would be against the principle of natural justice and we decline the invitation to do so.
46. Therefore, Issue No.2 is answered in the negative.
Issue no.3: Whether the Content and the Implications of the Inspectorate of Government's Letter dated 8th July, 2013 was in breach of Principles of Good Governance, Rule of Law, Accountability and Transparency contrary to the Provisions of Articles 6(d), 7(2) and 8(1)(c ) of the Treaty:
47. From the outset, we hasten to state that the gist of the Reference gravitates around the above issue. It is indeed, the respective letters of the Attorney General of Uganda and the IGG that are the bone of contention between the Parties in the Reference.

**The Applicants's Submissions**

48. It is the Applicant's submissions that, upon his disclosure of impropriety in the implementation of the MoU between the Government of Uganda and the QCIL, the IGG carried out investigations and discovered malpractices. The IGG then reported and at the same time recommended that:-
"1. The Attorney General should as a matter of urgency cause the review of the prices of drugs purchased under the Memorandum of Understanding with a view to ensuring that drugs purchased from CIPLA Ltd are purchased at prices not higher than International prices, and drugs purchased from QCIL are not more that 15% higher than CIPLA International prices;
2. The Government of Uganda and QCIL should review the need for further

importation of drugs as the QCIL plant in Uganda has already been commissioned; and

3. The Government of Uganda should consider recovery of the payments made above the 15% mark-up for drugs purchased from QCIL and payments for drugs purchased from CIPLA at prices above CIPLA International prices which amounted to USD17,826,038.94 for drugs procured between December 2009 and October 2010, and subsequent procurements which have not been calculated under this investigation" (see Amended Statement of Reference pp. 49-50).

49. It is the Applicant's further submission that, upon receipt of a copy of the IGG report and recommendations, the Attorney General instead of implementing the latter went ahead to criticize it on various dates:-

Firstly, on 12th April, 2012, the Attorney General wrote to the Inspector General of Government complaining about the content of the report and specifically saying that QCIL did not take advantage of the statutory 15% local content advantage. The Attorney General added that the Whistle-blower, Mr. Godfrey Magezi, being a representative of M/S Ajanta Pharmacy which had been supplying Anti-retroviral and Malaria drugs to the Ministry of Health, was motivated by business rivalry. Therefore, any information disclosed to the IGG about the impropriety in question should have been subject to criticism. The Attorney General concluded by stating that as long as the IGG did not bring out any wrong doing on the part of QCIL, the MoU could not be amended;

Secondly, on 29th May, 2013, through a letter addressed to the Health Minister and copied to the IGG, the Deputy Attorney General indicated that:-

"Pursuit of recovery of USD17,826,038.94 recommended by the IGG is without basis and will be an exercise in futility which will expose Government paying heavy damages and costs."

With reference to the aforesaid letters, the IGG on 8th July, 2013 wrote to the Minister of Health stating that:-

"…….the Inspectorate deems the review and amendment of the Original MoU, and the execution of the Amended MoU and Guarantee on 16th April, 2012, to be adequate implementation of all recommendations contained in the report and deems the matter closed."

50. It was the Applicant's argument that the IGG's letter constituted a turn-about caused by the Attorney General's rejection of the report and that in doing so, the office of the IGG abdicated its constitutional and statutory mandates.

51. The Applicant submitted that the Attorney General has no powers to review the IGG's report as long as the mandate of the IGG derives from the Constitution. Had he such a power, the Attorney General should have applied it to other investigations carried out by the Inspectorate of Government instead of being selective and unequal by quashing one report only without any legal basis or criteria, argued the Applicant.

He contended that once he has made a disclosure followed by investigations and findings of impropriety under the Whistle-blowers Protection, the only action that should have been taken was the one appropriate in accordance with Section 8 of the above Act to the extent that the Applicant expected to be rewarded.

52. The Applicant therefore asserted that the actions of both the IGG and Attorney

General constituted an infringement and a breach of the principles of good governance, accountability and rule of law as provided for under Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

53. In support of his submissions, the Applicant relied on the authorities of J*ames Katabazi & 21Others vs. Secretary General of the East African Community and the Attorney General of the Republic of Uganda EACJ Reference No.1 of 2007, Smit Indira Nehru Gandhi vs. Shri Raj Narain & Anathor Air 1975 SC 2299 Supp SCC or 19762 SCR 347 and HEABC vs. Facilities Subsector Bargaining Association 2004 BCSC 603* as well as on the definition of good governance, accountability and rule of law in those decisions.
54. In conclusion, the Applicant invited this Court to find Issue No.3 in the affirmative.

**The Respondent's Submissions**

55. The Respondent on his part submitted that both the IGG and the Attorney General of Uganda acted within their respective constitutional and statutory mandates.
56. He further argued that the IGG derives powers from the Constitution and the Laws of Uganda and pointed out that more specifically, Section 14(5) and (6) of the IGG Act provides that:-

    "5. The Inspectorate shall have powers to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of Authority or public office.

    6. The Inspector General, may during the cause of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances."
57. In respect of the 1995 Constitution of the Republic of Uganda, the Respondent stated that Article 230(1) & (2) reads:-

    "1. The Inspector General of Government shall have power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, , abuse of authority or of public office.

    2. The Inspector General of Government may, during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances."
58. The Respondent then averred that the IGG applied the above provisions while discharging her duties and in so doing, did not in any way operate outside the principles of good governance, democracy and rule of law. He added that the various authorities and legal sources quoted by the Applicant have been cited out of context but he agreed with the definition of rule of law as laid down in *James Katabazi [supra]*.
59. Regarding the Attorney General's legal opinion, the Respondent further submitted that his advice did not in any way hinder the IGG's powers to the extent that he exercised his constitutional mandate under Article 119(3) and (4) of the Uganda Constitution. The Respondent asserted that upon further scrutiny of the IGG report, he wrote down his legal opinion and forwarded it to the IGG who, after consideration, reviewed her recommendations.
60. The Respondent further pointed out that he did not quash, set aside or nullify the IGG's recommendations but rather that he scrutinized the report and came up

with appropriate advice in the light of his constitutional mandate. In support of his submissions, the Respondent cited a number of authorities including the Case of *Jim Muhwezi & 3 ORS vs. Attorney General & ANOR, Constitutional Petition No.10 of 2008* where the Applicant had alleged that it was unconstitutional for the President of the Republic of Uganda to direct the IGG to investigate any matter. The Constitutional Court indeed found that the IGG has a plain exercise of discretion on whether or not to investigate any matter and stated so in clear terms as follows:-

"….the President did all these in the impugned letter to the IGG. He like anyone else has the right to make a complaint to the IGG. It is the absolute right of the IGG to investigate and determine how to do it. Whether the President "directs" or "instructs" the IGG is in my opinion of no consequence since the Office of the IGG is independent and the IGG must take the decision independently whether to investigate and how to investigate.

…….He will most likely use the terms of command like "direct", "order" or "instruct", even where the officer ordered, directed or instructed has the powers under the Constitution to choose or to act or not to act."

61. The Respondent therefore submitted that his legal opinion did not amount to a directive or an order to the IGG in as far as the IGG is constitutionally clothed with the powers to decide what actions she would take. In light of the foregoing, the Respondent invited the Court to answer Issue No.3 in the negative.

**Determination on Issue No.3**

62. The issue before us is neither an issue of the IGG's report nor of the content of the report, but an issue of consistency of the aforesaid letters of the IGG and Attorney General of the Republic of Uganda with Articles 6(d), 7(2) and 8(1)(c) of the Treaty.
63. From the onset and for the sake of clarity, it is important to recall the contents of the above Articles of the Treaty.

Article 6(d) reads as follows:-

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

(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."

Article 7(2) of the Treaty reads:-

"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."

Lastly, Article 8(1)(c) states that:-

"The Partner States shall abstain from any measures likely to jeopardize the achievement of the objectives or the implementation of the provisions of this Treaty."

64. In his submissions, the Applicant submitted and insisted on the definition of good governance, democracy and rule of law as the basis of his Reference whereas the Respondent argued that the above definitions were cited out of context save for the

one laid down in *James Katabazi [supra]* where this Court found that:-

"The rule of law requires the government to exercise its powers in accordance with well-established and clear rules, regulations and legal principles …. when a government official acts, pursuant to an express provision of a written law, he acts within the rule of law."

65. The nexus between Articles 6(d) and 7(2) of the Treaty lies in the principles of good governance, democracy and rule of law which are not detailed anywhere else in the Treaty.
66. In its 1992 report entitled "Governance and Development", the World Bank defined good governance as "the manner in which power is exercised in the management of a country's economic and social resources for development."
67. The International Fund for Agricultural Development (IFAD) in the Sixty-Seventh Session of its Executive Board described the essence of good governance as "predictable, open and enlightened policy, together with a bureaucracy imbued with a professional ethos and an executive arm of government accountable for its actions. All these elements are present in a strong civil society participating in public affairs, where all members of the society act under the rule of law".
68. For the International Development Association (IDA), good governance can be assessed on the following four major pillars or principles:-
    - Accountability;
    - Transparency;
    - The rule of law; and
    - Participation.
69. As regards the principles of democracy, the International Covenant on Civil and Political Rights (December, 1966) provides for the following rights as expressive of a true democracy:-
    - Freedom of expression under Article 19;
    - The right of peaceful assembly under Article 21;
    - The right to freedom of association with others under Article 22;
    - The right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives under Article 25.
70. Needless to say that the above Covenant is binding on the Republic of Uganda because it has signed and ratified the same.
71. The Fifty-ninth Session of the United Nations' General Assembly of 23rd March, 2005 declared that "the essential elements of democracy include respect for human rights and fundamental freedoms, *inter alia* freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free election by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as pluralistic system of political parties and organisations, respect for the rule of law, the separation of powers, the independence of judiciary, transparency and accountability in public administration …."
72. The common linkages that can be deduced from those principles are, rule of law and equity before the law. It is our understanding that the rule of law, democracy and

good governance are the major features of a civilized society and as such, the rule of law provides the general framework for good governance. Rule of law implies that every citizen is subject to the law including the lawmakers. Put another way and specifically in the context of this Reference, it means that the IGG as well as the Attorney General of Uganda are bound by the Rule of Law.

73. Having said so, it is our obligation to determine whether the letter of the IGG and the legal opinion of the Attorney General of Uganda infringed Treaty provisions. Sadly, the Applicant did not elaborate enough on that issue and therefore, it is vital on our part to peruse the powers vested on the IGG by the constitution of Uganda, 1995, the Inspectorate of Government Act, 2002 and the Constitutional powers of the Attorney General as well as the IGG's letter dated 8th July, 2013 and the two legal opinions from the Attorney General. We will thereafter confront them with the aforesaid Treaty provisions.
74. It is the Applicant's submission that the Attorney General, through his legal opinion, usurped the powers of Parliament to make law by settling himself as the appellate body to review the findings and recommendations of the IGG which amounted to a violation of the Constitution of Uganda and Articles 6(d), 7(2) and 8(1) (c) of the Treaty.
75. Article 119(3) and (4) of the Constitution of Uganda reads as follows:-
    "3 The Attorney General shall be the principal legal adviser of the Government;-
    4. The functions of the Attorney General shall include the following:-
    a) To give legal advice and legal services to the Government on any subject;
    b) To draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party of in respect of which the Government has an interest;
    c) To represent the Government in Court or any other legal proceedings to which the Government is a party; and
    d) To perform such other functions as may be assigned to him or her by the President or by Law."
76. In his letter dated 12th April, 2012 and addressed to the Inspector General of Government, the Attorney General explained the content of the MoU between the Government and the QCIL and concluded by stressing as follows:-
    "However, before the clearance could be issued, the IGG informally requested the Solicitor General to stay the clearance for, it is stated there was an on-going inquiry.
    If the enquiry referred to be the one comprised in the report forwarded, there is no bar to this office clearing the draft Memorandum of Understanding ……..
    As long as you have not formally brought to our notice any wrong doing on the party of M/S Quality Chemical Industries Limited, the current Memorandum of Understanding is cleared with the comments.
    Your office can still go ahead with the investigations if you so wish."
77. From the above statement, we do not see any single word that amounts to a review or quashing of the IGG's report and the Applicant did not give any evidence to back his assertions at all. We are of the firm view therefore that the Attorney General acted within the legal framework and that his actions are not inconsistent with the rule of law as the Applicant has argued.

78. The Inspectorate of Government Act, 2002 gives special powers to the IGG in the exercise of his/her mandate. Indeed Section 14(6) of the Inspectorate of Government Act, 2002 spells out that:-
"The Inspector General may, during the course of his or her duties or as consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances."
79. Section 14(8) goes further and states as follows:-
"Notwithstanding any law, the Inspectorate shall not require the consent or approval of any person or authority to prosecute, or discontinue proceedings instituted by the Inspectorate."
We observe that these provisions are well framed and provide for functional independence.
80. Further and more importantly, Article 230 of Uganda Constitution, 1995 provide for special powers of the Inspectorate of Government and it reads as follows:-
"The Inspector General of Government may, during the course of his or her duties or as a consequence of his or her findings, make such orders and give such directions as are necessary and appropriate in the circumstances."
81. Such a provision especially provided for under the Constitution gives more powers and strength to the IGG to the extent that he or she can act independently. In the same vein, we note that he IGG wrote to the Attorney General pointing out that the review and amendment of the original MoU and the execution of the Amended MoU and Guarantee on 16th April, 2012 are adequate implementation of all recommendations contained in the report. In so doing, the IGG applied special powers conferred by the Constitution and that is consistent with the rule of law.
82. The Applicant has never challenged the Inspectorate of Government Act, 2002 for being inconsistent with Articles 6(d), 7(2) and 8(1) (c) of the Treaty. Turning back to Article 8(1) (c) of the Treaty therefore, we have not found any submission from the Applicant in respect of violation of the Treaty and by any stretch of imagination, we do not see how the aforesaid IGG's letter jeopardised the achievement of the objectives of the implementation of the Treaty.
83. Another salient issue that was raised by the Applicant is that the IGG's change of mind was caused by the rejection of the report by the Attorney General.
84. On that issue, we only need to say that the Attorney General did not perform any function which altered the IGG's powers as set out in Article 230 of the Uganda Constitution. Moreover, the legal advice of the Attorney General is merely advisory rather than binding on the IGG.
85. On the mandate of the Attorney General, the Supreme Court of India held in the case of *Mr. Shri Mani Ram Sharma and Others No.001322 vs. the Attorney General of India on 10th December, 2012* that:-
"…….. the duty of the Attorney General is to render advice to the Government of India on legal matters. Viewed thus, he cannot be said to be an authority as he does not perform any functions which alter the relations or rights of others. The advice rendered by him may be accepted by the Government of India or it may not be accepted. His advice per se does not have a binding effect"
We fully associate ourselves with the above authority as well as the findings in the

case of *Jim Muhwezi & 3 ORS vs. Attorney General and Anor, Constitutional Petition No.10 of 2008. [supra]*

Consequently and in view of all the foregoing, we hold and find Issue No.3 in the negative.

Issue No.4: Whether there was any Loss of USD17,826,038.94 by the Government of Uganda and Quality Chemical Limited:

86. The paramount question herein is whether this is an issue to be determined by this Court.

**The Applicant's Submissions**

87. To begin with, Counsel for the Applicant submitted that there is unfortunately no provision under the Treaty that clothes the Court with jurisdiction to ascertain whether there was such a loss or not. Consequently, he submitted that the Court should dismiss Issue No.4 for lack of jurisdiction.

**The Respondent's Submissions**

88. Counsel for the Respondent on his part argued that the Applicant's case as well as his submissions are premised on the alleged inaction or failure by the Government to recover a huge loss of money. Therefore, Counsel for the Respondent submitted that the Applicant should demonstrate such a loss with enough evidence otherwise the Government cannot be blamed for any hypothetical inaction or failure.
89. In conclusion, Counsel for the Respondent invited the Court to find that there was no loss of USD17,826,038.94 by Government of Uganda to QCIL.

**Determination on Issue No.4**

90. We have considered the submissions from all the Parties and at this stage, we have to opine as follows:-

    This issue is not a standalone question rather it has to be read and understood in the context of Issue No.3. That is to say that, once we have determined Issue No.3 in the negative, Issue No.4 is no longer alive to the extent that those two Issues are intertwined.
91. In any event, we have no jurisdiction to determine such a matter.

    Issue No.5: Whether there was Inaction, Refusal/or Failure by the Government of Uganda to recover USD17,826,038.94 from Quality Chemical Industries Limited:
92. This Issue is a corollary of the two foregoing issues in so far as it cannot be read and interpreted in isolation. Once we have determined that there has been no violation of Articles 6(d), 7(2) and 8(1) (c), then Issue No.5 is untenable.

    Issue No.6: What Reliefs are available to the Parties?
93. All the core issues framed in the course of the Scheduling Conference have been addressed and at this stage, we have to determine the prayers sought in the Amended Reference in light of our findings.
94. Prayer (1): A declaration that the inaction, refusal or failure or and/or by the Government of Uganda to recover USD17,826,038.94 from Quality Chemical Industries Ltd as per the Inspectorate's recommendations and report of December, 2011 is an aberration and fundamental departure from the principles of good

governance, accountability and a subversion of the principle of rule of law and is contrary to Articles 6(d), 7(2) and 8(1) (c) of the Treaty.

95. Prayer No.1 is premised on Issue No.5 which has been determined in the negative. Therefore, there is no basis to grant that prayer. It is thus disallowed.
96. Prayer (2): A declaration that the Act of the Inspectorate in deeming "the review and amendment of the original MoU and the execution of the Amended MoU and Guarantee on 16th April, 2012" to be adequate implementation of all recommendations contained in the report and thereafter closed the matter, is a breach and infringement of Articles 6(d), 7(2) and 8(1)(c ) of the Treaty.
97. The prayer is based on Issue No.3. In our analysis above, we reached the conclusion that the content and the implication of the IGG's letter dated 8th July, 2013 was consistent with the principles of good governance, rule of law, accountability and transparency.
98. We found indeed that the Attorney General's legal opinion to the IGG was merely advisory and did not have a binding effect. Hence, the IGG acted independently in accordance with her constitutional mandate. Consequently, once we have dismissed Issue No.3, prayer (2) becomes moot and is thus disallowed.
99. Prayer (3): An order enforcing compliance with and adherence to the Treaty and directing the Government of Uganda to immediately adhere and comply with the Treaty by taking measures to recover the USD17,826,038.94 from M/S Quality Chemical Industries Ltd rather than deeming the same to have been recovered through the review and amendment of the original Memorandum of Understanding at the execution of the Amended Memorandum of Understanding and Guarantee.
    Firstly, the above prayer is grounded on the alleged violation of the Treaty.
    Secondly, prayers No.1, 2 and 3 are interconnected and once we have disallowed the precedent prayers, the third one automatically collapses.
    Prayer No.4: An order that the costs of this Reference be paid by the Respondent.
100. Rule 111(1) of the EACJ Rules of Procedure provides that costs shall follow the event in any proceeding unless the Court shall for good reasons otherwise order. In that regard, we did not find any public interest in this Reference, rather the Applicant (Whistle-blower) was prompted by personal interests as an alleged whistle-blower. Accordingly, the Applicant shall bear costs for this Reference.

**Conclusion**

101. For all the foregoing reasons, the Reference is hereby dismissed and as a result, we make the following final orders:-
    1) Prayers 1, 2, 3 and 4 are disallowed; and
    2) The Applicant shall bear costs of the Reference.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No.7 of 2013

**Burundian Journalists Union And The Attorney General of the Republic of Burundi**

**And**

**Forum pour le Reinforcement de la Societe Civile, The International Press Institute, Maison pour de la Presse du Burundi, Forum la Conscience et le Development, PEN Kenya Centre, Pan African Lawyers Union, PEN International, Reporters sans Frontiers, World Association of Newspapers and News Publishers - Amici curiae**

Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Monica Mugenyi, J
May 15, 2015

*Amici Curiae's limited role - Freedom of the press- Implementation of judgment- Restrictive Press laws- Reasonability, rationality and proportionality tests- Revelation of sources of information - Whether provisions of Burundi Press Law were inconsistent with the Treaty.*

*Articles 6(d), 7(2), 27(1), 30(1) of the Treaty - Rule 24 of the East African Court of Justice Rules of Procedures, 2001 – Burundian Law No.1/11 of 4th June 2013 - Paragraph 34 UN Human Rights Committee's General Comments on the Right to Freedom of Expression.*

The Applicant contented that Law No.1/11 of the 4th June, 2013 and amendments to Law No.1/025 of 27th November, 2003 regulating the press in Burundi contravened Articles 6(d), 7(2) of the Treaty. They restricted freedom of the press, rule of law, accountability, transparency, and good governance. The laws *inter alia*: restricted what could be published by the media; required journalists to disclose confidential sources of information; provided restrictive framework for the regulation of the print and web media and a regime of fines and penalties that allegedly restricted the freedom of expression They claimed that the Press Laws had received wide criticism internationally even before enactment.

While acknowledging the criticism, the Respondent averred that a case challenging the Laws was pending before the Constitutional Court of Burundi and, that the Reference was premature and misconceived.

**Held:**

1) The tests of reasonability, rationality and proportionality are some of the tests to be used to determine whether a law met the muster of a higher law. Article 8(2) of the Treaty obligates Partner States to enact National Laws to give effect to the Treaty and to that extent, the Treaty is superior law.
2) Certain provisions of the Press law offend the principles in Articles 6(d) and 7(2)

of the Treaty: Revealing sources of information did not meet the expectations of democracy and is in violation of Articles 6(d) and 7(2) of the Treaty.

3) The restrictions not to disseminate information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of Inquiry by the State" in Article 19 of the Press Law violated the principles enshrined in Articles 6(d) and 7(2) of the Treaty.
4) The Court directed the Republic of Burundi to implement this Judgment under Article 38(3) of the Treaty, within its internal legal processes.
5) Article 20 of the Burundian Law No.1/11 of 4th June 2013 amending Law No.1/025 of 27th November 2003 to the extent that it obligates journalists to reveal their sources of information before the competent authorities in situations where the information relates to offences against State security, public order, State defence secrets and against the moral and physical integrity of one or more persons is in violation of Articles 6(d) and 7(2) of the Treaty.

**Cases cited:**

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

Bantam Books Inc. v. Sullivan U.S Supreme Court 372 U.S 58 (1963)

Charles Onyango-Obbo and Anor v. Attorney General, Supreme Court of Uganda, Constitutional Appeal No.2 of 2002

CORD v. the Republic of Kenya and Others, High Court of Kenya, H.C. Petition No.628 of 2014

Democratic Party v. the Secretary General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi, EACJ Reference No.2 of 2012

Goodwin v. UK , ECHR, Appl. No.28957/95 (2009)

Mandela vs. Falati (I) S.A 251(W) 1995,

Media Rights Agenda & Others v. Nigeria, ACPHR Comms 105/93,128/94,130/94 and 152/96 (1998)

Miami Herald Publishing Co. v. Tornillo 418 US 241(1994)

Observer and Guardian v. U.K ECHR Appl. No.13484/88 (1991)

Print Media South African & Anor v. Minister of Home Affairs & Anor [2009], ZACC 22

R v. Oakes, Supreme Court of Canada (1986) ISCR 103

R v. Secretary of State for the Home Department ex-parte Firms [1999] UKHL 33(1999

R. v Chaulk (1990) 3, SCR 1303

R. v. Big Drug Mart (1985) ISCR 295

Ramesh Thappar v. State of Madras 1950 SCR 594

Republic of South Africa v. 'Sunday Times Newspaper' & Anor (2) SA 221 (1994)

Roriesh Thappar vs. State of Madras 1950 SCR 594

S. v. Mamabolo [2001] ZACC 17

Samuel Mukira Mohochi v. AG of Uganda, EACJ Reference No. 5 of 2011

Scanlan & Holderness v Zimbabwe, ACPHR Comm.297/05 (2005)

**Judgment**

1. This Reference was filed on 30th July, 2013 by the above named Applicant and was brought under Articles 6(d),7(2), 27(1), 30(1) of the Treaty for the Establishment of the East African Community ("the Treaty") as well as Rule 24 of the East African Court of Justice Rules of Procedure . Certain orders and declarations are sought in the Reference which we shall reproduce later in this Judgment.
2. The Applicant describes itself as a legal person under Burundian Law registered by an ordinance dated 8th July, 2013 although its Articles of Association were adopted on 3rd October, 2009. Amongst its stated objectives are the encouragement of the media to defend freedom of the press and social justice as well as freedom of expression.
3. The Applicant's address is Boulevard du 28 Novembre, Robert 1, Avenue de Mars, B. P. 6719, Bujumbura, Burundi and at the time of hearing was represented by Mr. Donald Omondi Deya, Advocate of No.3 Jandu Road, Corridor Area, P.O. Box 6065, Arusha, Tanzania.
4. The Respondent is the Attorney General of the Republic of Burundi sued in his capacity as such and also as Minister for Justice and Holder of the Seal and his address is P.0 Box 1880 Bujumbura, Burundi. Mr. Neston Kayobera, Director of Judicial Organization in the Respondent's office, at all times during the proceedings, appeared on his behalf.
5. By order of this Court issued on 15th August, 2014 in EACJ Application No.2 of 2014, nine non-governmental organizations were joined as *Amici curiae*. They are *Forum pour le Reinforcement de la Societe Civile*, the International Press Institute, Maison Pour de la Presse du Burundi, *Forum la conscience et le Developement*, PEN Kenya Centre, Pan African Lawyers Union, PEN International Reporters sans Frontiers, and the World Association of Newspapers and News Publishers.
6. They are all represented by Mr. Vital Neston Nshimirimana, Advocate and his address is 6 Avenue de la mission, BP 1745, Bujumbura, Burundi.
7. The *Amici Curiae's* roles in the proceedings were limited to the filing of submissions only.

**Background**

8. It is agreed that the Reference concerns Law No.1/11 of the 4th June, 2013, amending Law No.1/025 of 27th November, 2003 regulating the press in Burundi ("the Press Law"). From the pleadings, the Press Law was adopted by the National Assembly on 3rd April, 2013, passed by the Senate on 19th April, 2013 and signed into effect by the President of the Republic of Burundi on 4th June, 2013.
9. It was the Applicant's contention that the Press Law as enacted, restricts freedom of the press which is a cornerstone of the principles of democracy, rule of law, accountability, transparency, and good governance. Further, that the Press Law violates the right to freedom of expression and all the restrictions contained in it are in contravention of the Republic of Burundi's obligations under Articles 6(d), 7(2) of the Treaty.
10. In particular, the Applicant claims that the following Articles of the Press Law allegedly violate the Treaty:-
    - Articles 5, 6, 7, 8 and 9, which require compulsory accreditation for all journalists

in Burundi;

- Articles 17, 18 and 19 which lay down a broad set of restrictions of what may be published by the media in Burundi;
- Article 20 which requires journalists to disclose confidential sources of information;
- Articles 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 44 and 45 which provide an unduly onerous and restrictive framework for the regulation of the print and web media;
- Article 46 which provides for a prior censorship regime for films proposed to be directed in Burundi;
- Articles 48,49,50,51,52,53 and 54 which provide for a right of reply and correction that is vaguely worded and unduly impedes the media's right to freedom of expression;
- Articles 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67,68 and 69 which provide for a regime of fines and penalties that is allegedly unduly restrictive on the right to freedom of expression and fails to comply with generally accepted principles of criminal law and procedure.

11. For the above reasons and other reasons to be set out later, the Applicant beseeches this Court to:-
    i) Declare that the Burundi Press Law violates the right to press freedom and thereby constitutes a violation of Burundi's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty;
    ii) Declare that the Burundi Press Law violates the press' right to freedom of expression and thereby constitutes a violation of Burundi's obligation under the Treaty to uphold and protect human and peoples' rights standards as specified in Articles 6(d), 7(2)of the Treaty;
    iii) Order Government of Burundi to, without delay:
        a) Repeal the Press Law; or
        b) Amend it in accordance with Burundi's obligations as specified in Articles 6(d) and 7(2) of the Treaty by striking out or amending Articles 5 to 10, 17 to 20, 26 to 35, 44 to 46, 48 to 54, 56 to 64 and 66 to 69 of the Press Law.

**The Applicant"s Case**

12. The Applicant's case is contained in the Reference, the annexures to it, a document titled "Amended Reply" filed on 30th March, 2014, written submissions filed on 3rd November, 2014, and Rejoinder submissions filed on 2nd December, 2014.
13. Mr. Donald Deya at the hearing also handed to Court his talking points to guide his oral highlights of the above submissions.
14. It was the Applicant's contention that the Press Law received wide criticism even before its enactment when the UN Office of the High Commissioner for Human Rights in a press statement urged the Burundi Legislature to review it "to ensure its conformity with international human rights standards".
15. The African Union Special Rapporteur for Freedom of Expression and Access to Information also contended that "[criminal defamation, insult and false news]

are often used by government officials and corporate interests to punish legislative criminal expression." He added that Burundi had acted with a view to restricting amongst others "infringements that could affect the credit of the state and national economy" and "information that could affect the stability of currency" and if passed, would have the potential to reverse the gains that the country had made in the area of media freedom.

16. After the passage of the Law, the Applicant claimed that criticism continued with among others, the United Nations Secretary General, Ban Ki Moon regretting that it had a negative impact and urged Burundi to take steps to ensure that its legal framework is aligned with democratic tradition. Other organisations like Human Rights Watch, Transparency International, Reporters without Borders, and Amnesty International posted similar criticism of the Press Law.
17. The Applicant also contended that this Court has the jurisdiction by dint of Articles 23 and 27(1) of the Treaty to enforce the Treaty and determine whether Articles 6(d) and 7(2) thereof have been violated by the Republic of Burundi as alleged and that the adoption of the Press Law materially violates the principles enunciated in these Articles.
18. Further, that no organ of a Partner State has the same primary jurisdiction as this Court to interprete the Treaty and although a Constitutional challenge was made by *Maison de la Presse du Burundi*, an association under Burundian Law, no decision by the Constitutional Court of Burundi had been received by the time this Reference was filed. In any event, that there is no obligation to exhaust local remedies before approaching this Court on any legitimate matter.
19. On the principles enshrined in Articles 6(d) and 7(2) of the Treaty, the Applicant has urged the point that they are more than just aspirational and Partner States have to observe them as a matter of Treaty obligation. That once a Partner State has given force of law to the Treaty, then any laws adopted by it should not conflict with it and the Press Law allegedly fails to meet that expectation.
20. On Freedom of the Press, the Applicant contended that the principles of democracy, rule of law, accountability, transparency and good governance cannot be upheld where there is no free press. That without a free press, there is no free circulation of information and ideas and the electorate does not have the opportunity to properly inform itself of choices placed before it. Such an electorate, uninformed as it is, cannot, in turn, properly hold its leaders to account and this is a denigration of the core principles of good governance and democracy.
21. The Applicant has specifically complained about Articles 5-9, 10, 17-19, 20, 26-35, 44-45, 46, 48-54, 56-64 and 66-69 of the Press Law and has averred that all their provisions, cumulatively, violate Burundi's obligations under the Treaty. Of importance in that regard is the argument that the role and actions of the National Communications Council (set up by Law No.1/03 on 24th January, 2013 revising Law No.1/18 of 29th September, 2007), violate the principles of fairness and justice as it is akin to a prosecutor, judge and enforcer in matters of the press and yet, it is directly appointed and controlled by the President and the Minister for Information. That although it has been granted wide powers, its function as a censorship body are totally at the behest of the State. Further, that because of its lack of independence,

it should not be in a position of imposing potentially major fines on the media and individual journalists.

22. Later on in the judgment, we shall delve into submissions on each of the specifically challenged provisions of the Press Law, but for the above reasons, the Applicant seeks the orders and declarations elsewhere set out above.

**The Respondent's Case**

23. The Respondent's case is contained in the Response to the Reference filed on the 20th December, 2013 and the Supplementary Affidavit of Mr. Sylvester Nyandwi, Permanent Secretary in the Ministry of Justice, sworn on 16th October, 2014. Mr. Kayobera also filed written submissions on 4th December, 2014.
24. It was his case that the Press Law is in uniformity with the Treaty and specifically Articles 6(d) and 7(2). Further, the acknowledged fact that it has been criticised by some organisations and individuals does not imply that the said Law violates the Treaty. In addition, that the Parliament of Burundi passed the Press Law as the representative of the people and its decisions cannot be replaced by the wishes of any other organization or person.
25. In any event, that the Press Law has been challenged in the Constitutional Court of Burundi and since its decision is yet to be delivered, the Reference is premature and misconceived as the latter Court is the only one with jurisdiction to interpret the legality of the Press Law.
26. For the above reasons, the Respondent prays that the Reference be dismissed with costs.

**Scheduling Conference**

27. At the Scheduling Conference held on 18th September, 2014 pursuant to Rule 53 of the Rules, it was agreed that the Press Law came into effect on 4th June 2012 but that the Constitutional Court of Burundi, after the Reference and a response to it had both been filed, had declared parts of it to be unconstitutional.
28. The issues that were therefore, drawn for determination were the following:-
    a) Whether the Reference is properly before this Court;
    b) Whether the provisions of the Burundi Press Law are inconsistent with and in violation of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community; and
    c) Whether the Applicant is entitled to the Reliefs sought.
29. We shall now proceed to address each of the above issues.
    Issue (A): whether the reference is properly before this court:
30. This issue was limited to whether the Reference can stand after a challenge to the Press Law was made before the Constitutional Court of Burundi, which interprets its Constitution, and whose decisions are final and cannot be appealed from.

**Applicant's submissions**

31. Invoking Articles 23 (1) and 27(1) of the Treaty, the Applicant submitted that this is the only appropriate Court to rule on questions regarding the interpretation and application of Burundi's obligations under the Treaty. In that regard, it placed reliance

on past decisions of this Court in *Anyang' Nyongo' & Others vs. the Attorney General of Kenya, EACJ Ref. No. 1 of 2006; Modern Holdings (EA) Ltd vs. Kenya Ports Authority EACJ Reference No.1 of 2008 and Emmanuel Mwakisha Mjawasi & 78 Others vs. the Attorney General of Kenya EACJ Appeal No.4 of 2011*.

32. In addition, it was the Applicant's submission that under Article 33 of the Treaty, decisions of this Court on interpretation and application of the Treaty shall have precedence over decisions of National Courts on a similar matter. In that regard and in any event, the Applicant argued that there is no requirement that a Party must exhaust local remedies before approaching this Court and relied on the decision of *Rugumba vs. Attorney General of Rwanda , EACJ Reference No.1 of 2012* in that regard.
33. The Applicant also made the point that, in the present Reference, whereas the Constitutional Court of Burundi has ruled on the Constitutionality of the Press Law, that fact is not a bar either to the bringing of the Reference or the jurisdiction of this Court to interrogate that Law from a Treaty perspective and to determine whether a Partner State has breached its obligations under the Treaty.
34. Finally, it was the Applicant's case that the Reference is not misconceived and this Court has the jurisdiction to determine the salient and important issues raised in it.

**Respondent's submissions**

35. The Respondent on this issue submitted that on 7th January, 2014, the Constitutional Court of Burundi declared that the Press Law was constitutional save for a number of Articles that it struck down.
36. In the event, it was his argument that the said Judgment is final and not subject to the intervention of any other court, including the EACJ, and that a contrary decision to the effect that the Law violates press freedom and the right to the freedom of expression would mean bringing chaos to Burundi and would also "mean challenging the decisions of the Constitutional Court ….and would contravene the powers conferred to the EACJ by the Treaty."
37. In addition to the above, it was the Respondent's submission that Burundi is preparing itself for General Elections in the first quarter of the year 2015 and to invalidate its lawfully enacted Press Law would jeopardize the fragile peace enjoyed by the people of Burundi taking into accounts its history and future.

*Amici curiae's* **submissions**

38. On this issue, the *Amici Curiae* preferred not to make any submissions at all.

Determination on issue (a)

39. The jurisdiction of this Court is set out in Articles 23(1) and 27(1) of the Treaty which in a nutshell clothe it with the exclusive mandate to apply and interpret the Treaty save in the context of the proviso in Article 27(1) of the Treaty. This fact is not denied by either Party but the Respondent argued that once the issue of the legality and constitutionality or otherwise of the Press Law has been determined by the Constitutional Court of Burundi, then, that issue is finalized and no other Court, including the EACJ, can be properly seized of it.
40. With tremendous respect to the Respondent, what is before this Court is not a question whether the Press Law meets the constitutional muster under the

Constitution of the Republic of Burundi but whether it meets the expectations of Articles 6(d) and 7(2) of the Treaty. The Applicant has not cited a single provision of the Burundi Constitution which it deems as violated by the Press Law because that would have been a matter well within the jurisdiction of that Court in any event, and in its decision of 7th January, 2014, well after this Reference had been filed, it determined that Articles 61, 62, 67 and 69 of the Press Law were unconstitutional. In Article 225 of the Constitution of Burundi, the Constitutional Court is the best Judge of the constitutionality of the Laws and interprets the Constitutional Act (translated ad lib from the original French).

41. The above jurisdiction differs from that conferred by Article 27(1) which provides that this Court shall "initially have jurisdiction over the interpretation of the Treaty." The proviso thereof is irrelevant for purposes of this Reference, but suffice it to say that interpretation of the question whether Articles 6(d) and 7(2) of the Treaty were violated in the enactment of the Press Law is a matter squarely within the ambit of this Court's jurisdiction.
42. In holding as above, we are aware that the issue of jurisdiction has been settled in previous decisions of this Court. In *Anyang' Nyong'o and Others vs. Attorney General of Kenya and Others [supra]* for example, the Court stated that:-

"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 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 State; and
2. Decisions of the Court on the interpretation and application of this Treaty shall have precedence over decisions of national courts on a similar matter.

Article 34 provides:-

Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions 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.

43. Further, in *Democratic Party vs. the Secretary General and the Attorneys General of the Republics of Uganda, Kenya, Rwanda and Burundi, EACJ Reference No.2 of 2012*, the Court rendered itself as follows:-

"Jurisdiction is quite different from the specific merits of any case….

As it is, it should be noted that one of the issues of agreement as set out by the parties is that there are triable issues based on Articles 6, 7, 27 and 30 of the Treaty. That is correctly so since once a party has invoked certain relevant provisions of the Treaty and alleges infringement thereon, it is incumbent upon the Court to seize the matter and within its jurisdiction under Articles 23, 27 and 30 determine whether the claim has merit or not. But where clearly the Court has no jurisdiction because the issue is

not one that it can legitimately make a determination on, then it must down its tools and decline to take one more step- see: *Owners of Motor Vessel Lillian 'S' vs Caltex Oil (Kenya) Ltd - [KLR].*"

44. We wholly agree with the above exposition of the primacy of this Court's jurisdiction over the interpretation of the Treaty and we therefore reiterate the above findings and in determining Issue (a), we have no doubt that the Reference as framed and argued, is properly before us and that this Court has jurisdiction to determine the substantive issues raised in the Reference.

    Issue (B) – whether the provisions of the Burundi Press Law are inconsistent with and in violation of articles 6(d) and 7(2) of the treaty:

45. This is the heart of the Reference and the issue requires that this Court should look at the specific impugned provisions of the Press Law (cited elsewhere above), consider the purpose thereof and determine whether the enactment of and content of the said law are a violation of the Treaty in terms of Articles 6(d) and 7(2).

**Submissions by the Applicant**

46. The Applicant submitted that this Court has previously held that Articles 6(d) and 7(2) are justiciable and create an obligation on every Partner State to respect the principle of good governance which includes accountability, transparency and the promotion and protection of democracy. By acceding to the Treaty, then under Article 3 thereof, The Republic of Burundi, like other Partner States, agreed to be bound, in the context of this Reference, by the two Articles. Reliance in that regard was placed on the decision of this Court in *Samuel Mukira Mohochi vs. AG of Uganda, Ref. No.5 of 2011 and Rugumba vs. AG of Rwanda, [supra]* where a Partner State in each of the two cases was found to have violated the two Articles of the Treaty and in Mohochi, Articles 6(d) and 7(2) were held to be binding and not merely aspirational on their part.
47. On the right to information, a free press and freedom of expression, the Applicants submitted that various international and regional Courts, as well as tribunals, have upheld these principles including:-
    i) The African Commission on Human and People's Rights which in *Scanlan & Holderness vs Zimbabwe,Comm.297/05 (2005)* stated that, it is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole, that ensures public order.
    ii) The Commission in Law offices of *Ghazi Suleiman vs. Sudan, Comm. No.228/099 (2003)* also cited the Inter-American Court of Human Rights' opinion in Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion of – 5/85 (1985) and found that freedom of expression is a condition sine qua non for the development of political parties, scientific and cultural societies and in general, those who wish to influence society. That it is also indispensable for the formation of public opinion.
    iii) The same Commission in *Kenneth Good vs. Republic of Botswana Comm.313/05* also stated that free expression constitutes one of the essential foundations of a democratic society and is one of the basic working conditions for its progress and for the development of every man;

iv) The European Court of Human Rights in *Lingers vs. Austria; Appl. No.9715/82 (1986)* stated that freedom of political debate is at the very core of the concept of a democratic society;

v) In South Africa, in *Government of the Republic of South Africa vs. 'Sunday Times Newspaper' & Anor (2) SA 221 (1994)*, it was held that the role of a free press in a democratic society cannot be underestimated and that a free press is in the front line of the battle to maintain democracy.

vi) In the U.S Supreme Court in *New York Times vs. United States 403 U.S 713 (1971)* Black J held that only a free and unrestrained press can effectively expose the deception in Government;

48. In invoking the above decisions, the Applicant argued that the Republic of Burundi has an obligation, under Articles 6(d) and 7(2) of the Treaty, to recognize, promote and protect human and people's rights and abide by universally acceptable standards of human rights which include respect for press freedom. Relying on the decision in *Mandela vs. Falati (I) S.A 251(W) 1995*, it thus submitted that, freedom of the speech "is the freedom upon which all other freedoms depends."

49. On specific provisions of the Press Law, the Applicant submitted as hereunder:-

a) That compulsory accreditation under Articles 5-9 of the Press Law is not in conformity with Articles 6(d) and 7(2) because it unnecessarily and unjustifiably restricts those who become journalists. Further, that the National Communications Council enjoys vague discretion to withdraw or refuse accreditation in violation of the rights to freedom of expression.

50. In support of this submission, reliance was placed on the decision in *Compulsory Membership in an Association [supra], Scanlon & Holderness [supra], Kasoma vs. AG of Zambia Case 95/HP/29/95 as well as Sunday Times vs. United Kingdom Appl.no 6538/74 (1979)*, a decision of the European Court on Human Rights.

b) That the broad and vague restrictions on press freedom under Articles 10 and 17-19 of the Press Law are not in conformity with Burundi's obligations under Articles 6(d) and 7(2) of the Treaty. The submission made in that regard was that, the provisions prohibit the publication of certain categories of information in the print media, website as well as broadcasts. That the said restrictions are impermissibly vague and cannot be justified in a democratic society.

51. In support of the above submission, the UN Human Rights Committee's General comments on the Right to Freedom of Expression was cited and particularly its comment at paragraph 34 that restrictive measures must conform to the principle of proportionality.

c) That the right to protect confidential sources of information under Article 20 of the Press Law is not in conformity with Articles 6(d) and 7(2) of the Treaty. Further, that the Law requires that where the information concerns offences against State security, public order, all State secrets and national defense, or moral and physical integrity of a person, then the source ought to be disclosed. Such disclosure, it was argued, negates the well-established norm under International Human Rights Law that a confidential source of information ought to be protected and the right should only be restricted when a court has ordered disclosure, and in that regard the decision of the *European Court of Human Rights in Goodwin vs. UK Appl. No.28957/95 (2009)*

*and Saroma vs. Netherlands, Appl.38224/03 (2010)* were cited in support;

d) That print media is specifically regulated by Articles 26-35 and 44-45 and such an action cannot be in conformity with Articles 6(d) and 7(2) of the Treaty. The submission made in that regard was that, the Press Law creates a restrictive framework and limits who may be appointed a director of any media outlet and the said framework is unduly erroneous and is open to abuse because of the uncontrolled powers given to the National Communications Council which in itself is lacking in independence and is under the direct control of the Executive. In addition, that the involvement of the Public Prosecutor, various Ministries and Provincial governance in media regulation is worrisome.

52. It was also the Applicant's case that following international norms, only a purely administrative regime for the regulation of print media is permissible and the African Commission on Human Rights Declaration of Principles on Freedom of Expression in Africa was cited in support of that proposition.

53. The Applicant also cited the Cases of *Lapsevitch vs. Belarus UN Human Rights Committee Comm. No.780/1997 (2000)* and *Media Rights Agenda & Others vs. Nigeria, ACPHR Comms 105/93,128/94,130/94 and 152/96 (1998)* where it was held that restrictions that give governments the power to prohibit publication of any newspaper or magazine cannot be sustained.

e) That prior censorship of any films directed in Burundi under Article 46 of the Press Law cannot be in conformity with Burundi's obligations under Articles 6(d) and 7(2) of the Treaty.

54. According to the Applicant, the requirement of prior authorization from the National Communications Council before any film can be directed on Burundi's territory amounts to the creation of an illegimate prior censorship regime. In support of their proposition, reliance was placed on *Bantam Books Inc. vs. Sullivan 372 U.S 58 (1963)* in the U.S Supreme Court and *Observer and Guardian vs. U.K Appl. No.13484/88 (1991)* at the European Court on Human Rights (ECHR). In Bantam Books, the Court held that there is a heavy presumption of unconstitutionality with respect to prior restraints of expression while the ECHR stated that prior restraints required the most careful scrutiny.

f) That the rights of reply and correction regime under Articles 48-54 of the Press Law being vaguely worded, unduly impedes the media's right to freedom of expression thus, violating Article 6(d) and 7(2) of the Treaty. That by allowing corrections by public authorities in such circumstances, the Press Law legitimates continuous interference with the work of the media.

55. In addition to the above submission, the Case of Miami Herald Publishing Co. vs. Tornillo 418 US 241(1994) was cited where the US Supreme Court ruled that a mandatory right of reply to the print media was unconstitutional because it represented an unwarranted interference with editorial matters.

56. The Applicant also relied on a statement in the Report of the Mission to Hungary (29th January 1999) where the UN Special Rapporteur on Freedom of Expression took a skeptical view of the right to reply and stated that it should be allowed, if at all, only as part of the media industry's self-regulation and applied to correction of facts and not opinions.

57. Further, the Applicant pointed this Court to Resolution No. (74)2b where the Council of Europe's Committee of Ministers suggested the limited exceptions that should be made to the rule that the right to reply should only be applicable to facts and not opinions. The Press Law, it argued, provides on the other hand, an unduly broad set of circumstances and allows a near- continuous interference with the work of the media.

g) That Articles 56-64 and 66-69 of the Press Law create penalties that are unduly severe and restrictive of press freedom and fail to comply with generally accepted standards of criminal law and procedure. That the penalties also depart from the principle of proportionality and it was the Applicant's argument that under International Human Rights' Law, where a sanction is also placed when restricting the right to freedom of expression, such a sanction should not be disproportionally harsh. In that regard, the ECHR decision in *Tolstry Miloslavsky vs. UK, Appl. No.18139/92 (1993)* was cited in support thereof.

58. The Applicants also contended that the National Communications Council is not the appropriate authority to enforce the above Articles of the Press Law because it lacks the necessary independence to do so, as it is closely tied with the Executive. Its functions were also said to be incompatible with international standards on media regulation and its members work closely with Government ministries and annually submit reports to the Government from whom it also obtains its funds. That all these shortcomings are in conflict with the Joint Declaration by the UN, OSCE and OAS on Special Mandates. According to that Declaration, public authorities that regulate the media should be protected from political or economic interference.

59. In conclusion on this issue, it was the Applicant's submission that the Press Law, for the above reasons, is in breach of Burundi's obligations under the Treaty and the declarations and orders sought in the Reference should be granted as prayed.

**Submissions by the Respondent**

60. The Respondent, on this issue, gave a short and concise response; that since the Constitutional Court of Burundi has interrogated the Press law and found it wanting in a few respects only, then that determination is binding on the Applicant and this Court cannot overturn that decision in any respect as decisions of that Court are not subject to appeal. That to do so would jeopardize the powers conferred on the Constitutional Court of Burundi and "would bring chaos in that EAC Partner State (Burundi) which was improving her security after many years of civil wars …."(sic)

61. Mr. Kayobera also submitted that the Press Law had passed various stages of scrutiny in Burundi to wit the Cabinet, the National Assembly, the Senate, the Presidency and finally, the Supreme Court, in accordance with the principle of separation of powers (and checks and balances) and this Court cannot now overturn the decisions of these Constitutional Institutions.

62. Further, it was the Respondent's case that the orders sought cannot be granted as Articles 6(d) and 7(2) have not been violated in any way.

63. In making the above submissions, Mr. Kayobera relied on the decision of this Court in *Rugumba vs. AG of Rwanda [supra]* to make the point that although exhaustion of local remedies is not a condition precedent before filing any matter before this Court,

the Applicant had exercised its rights under Burundian Law and obtained a decision at the Constitutional Court and had no reason to come to this Court.

64. On the jurisdiction of this Court to grant certain orders, he relied on the case of *Nyamoya Francis vs. AG of Burundi & Anor, Ref. No.8 of 2011* and *Masenge vs. AG of Burundi, Ref. No.9 of 2012* to make the point that this Court, under Articles 23 and 23 of the Treaty as read with Article 30 thereof, cannot issue some of the orders sought in the Reference including annulling the Press Law in part or in whole.
65. For the above reasons, Mr. Kayobera prayed that the Reference should be dismissed with costs

**Submissions by the** *Amici Curiae*

66. The *Amici Curiae* submitted that looked at against past decisions of International and National Courts, the Press Law is inconsistent with freedom of expression and freedom of the Press and therefore, also contravenes the Fundamental and Operational Principles of the Treaty under Articles 6(d) and 7(2).
67. In his submission and in furtherance of the above position, Mr. Nshimirimana submitted that there is a crucial relationship between freedom of expression, freedom of the press and the Treaty – projected principles of democracy, the rule of law, accountability, transparency, social justice and the promotion and protection of human rights.
68. In that regard, he relied on the following decisions *inter alia*:-
    i) *Print Media South African & Anor vs. Minister of Home Affairs & Anor [2009]*, ZACC 22 where the Constitutional Court of South Africa described the press as "the public sentinel", and that the free press lies at the heart of democracy;
    ii) *R vs. Secretary of State for the Home Department ex-parte Firms [1999] UKHL 33(1999)* where Lord Steyn stated that free expression is a primary right and without it the rule of law is not possible;
    iii) *Roriesh Thappar vs. State of Madras 1950 SCR 594* where the Supreme Court of India held that freedom of speech and of the press lay at the foundation of all democratic organizations.
    iv) The Canadian Supreme Courts' decisions in Reference RE Alberta Statues [1938] SCR 100, *Irwin Troy Ltd vs. Quebec (AG) [1989]1 SCR 927*, *Canadian Broadcasting Corp; vs. Brunswick (AG) [1996] 3 SCR 480* where freedom of thought and expression, free discussion of public affairs and a free press were upheld as vital to any democracy and its institutions.
    v) In the same Court in the case of *Express Newspapers vs. Union of India 1985 SCR(2) 287* it was held that the purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate cannot make responsible Judgments.
69. Following the principles enunciated in all the above decisions, Counsel for the Amici Curiae submitted that good governance and human rights require freedom of the press and freedom of expression for them to flourish and that the Press Law negates these principles in specific ways as shall be detailed here below:-
    a) Accreditation Regime:
    Like the Applicant, the Amici Curiae faulted Articles 5-7 of the Press Law and

have relied on both the *Compulsory Membership Case [supra]* as well as *Scanlon & Holderness [supra]* to buttress their submissions.

b) Content-Based Restrictions:
Regarding Articles 17 – 19 of the Press Law, it was the *Amici Curiae's* submission that the restrictions contained therein limit the ability of the media to be critical of the Government or government officials. That such restrictions are detrimental to democracy and human rights and Courts in several jurisdictions have recognized this type of restriction as unacceptable.
The *Amici Curiae*, on the above submissions, relied on the decisions in *Mills vs. Alabama 384 U.S. 214 (1996), New York Times Co. vs. Sullivan 376 U.S. 254 (1964), Case of Herera – Ulva vs. Costa Rica[2004] 1ACCHR 3 and Lingers vs. Austria [supra]*.

70. It was their further submission that content-based restrictions that are unreasonable, for example on grounds of "morality and common decency" or "public order and security" should not be included in any progressive Statute on the Press.

c) Right of Reply and right of correction under Articles 48-54 of the Press Law:
On this point, the *Amici Curiae* submitted that while the right of reply has been recognized in some jurisdictions, others have concluded that it is inconsistent with freedom of expression and freedom of the press.
In support of the latter position, the Amici Curiae cited the decision in *Miami Herald Publishing Co. Ltd vs. Turnillo 418 US 241 (1974)* where it was held that editorial content and judgment is the choice of a newspaper and it had not been demonstrated in that case that governmental regulation in that regard is consistent with *inter alia*, the guarantee to a free press.
Further, that the UN Special Rapporteur on Freedom of Expression and Opinion stated that if a right of reply should exist, it should ideally be part of the industry's self-regulation and in any case, it should only be feasible when applied to facts and not to opinions. That the same position was taken by the Europe Committee of Ministers in its Resolution 74(2)) of 2nd July, 1974 while Slovakia amended its law to limit the right of reply regarding comments made about public officials in their individual capacities only.

d) Disclosure of sources under Article 20 of the Press Law
The Amici Curiae submitted that the requirements that journalists should disclose the identities of their confidential sources that have provided information relating to offences against state security, public order, state defence secrets, moral and physical integrity of one or more persons, is an affront to democracy.
Reliance in buttressing the above submission was placed on the decision in *Goodwin vs. UK (1996) 22 EHRR123* and the Supreme Court of Canada decision in *R. vs. National Post 2010 SCC 16*.

e) Fines and Penalties in Articles 56-64 and 66-69:

71. The submissions on this point were that fine-related Articles in the Press Law are contrary to freedom of expression and freedom of the Press. That while the Constitutional Court of Burundi appreciated that fact and struck some out of the Articles, a number still remain intact in the Press Law. The cited provisions, it was argued, are vague, broad in content restrictions and lack the clarity required of valid

criminal laws. In this regard, the decision in *Lingers vs. Austria (supra)* was cited and particularly in making the point that criminal sanctions should not be used to hamper the Press in performing its task as a purveyor of information and public watchdog.

72. In a nutshell, the Amici, like the Applicant, found fault in both the spirit and content of the Press Law and urged the Court to allow the Reference as framed.

Determination on Issue (b)

73. From the submissions above, it is clear that the Applicant and the Amici have taken the view that, looking at the freedom of the press and freedom of expression as vital components of every democracy, the Press Law does not meet that test and more so, in spirit and content, is a violation of Articles 6(d) and 7(2) of the Treaty.
74. The Respondent on the other hand has taken the view that the Press Law was tested by the Constitutional Court of Burundi and was found wanting in only a few Articles. That this Court must similarly and specifically find and hold that Articles 6(d) and 7(2) have not been violated.
75. Articles 6(d) and 7(2) of the Treaty, for avoidance of doubt, provide as follows:-

Article 6(d):

"The fundaments principles that shall govern the achievements of the objectives of the Community by the Partner States shall include;

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."

Article 7(2):

"The Partner States shall 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."

76. This Court has in a number of its decisions interpreted the two Articles as being justiciable and not merely aspirational and binds all Partner States to the principles enunciated therein. For example, in *Samuel Mukira Mohochi vs. AG of Uganda (supra)* the Court stated thus:-

"We fully associate ourselves with the above description and we are of the firm belief that herein lays 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. The 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.

Apart from asserting that the provisions are aspirations and broad policy provisions for the Community, political 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 crystallized into actionable obligations, breach of which gives rise to infringement of the Treaty."

77. We reiterate the above holdings and further, in the present Reference, the substantive issue to be addressed is the freedom of the press and freedom of expression in the context of Articles 6(d) and 7(2) as read with the Press Law. In that regard, there is no doubt that freedom of the press and freedom of expression are essential components of democracy. The submissions by the Applicant and the Amici on the correlation between the two have not been controverted at all and the Respondent did not submit on the legal foundation for the twin freedoms, the manner in which they can be restricted nor did he attempt to either distinguish the authorities cited nor submit on any legal authority where a contrary finding was made.
78. For avoidance of doubt, we have perused all the authorities submitted by Counsel for the Applicant and the *Amici Curiae* and we are satisfied that they properly express the Law in various jurisdictions. We are particularly persuaded that the holding in *Print Media South Africa (supra)* is pertinent to this Reference. In that case, Van der Westhuizen J. held that "freedom of expression lies at the heart of democracy" and went to state as follows:-

    "……..It is closely linked to the right to human dignity and helps to realize several other rights and freedoms. Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression. This Court has emphasized the importance of freedom of expression as the lifeblood of an open and democratic society"
79. Similarly, in *Ramesh Thappar vs. State of Madras 1950 SCR 594*, the Supreme Court of India stated thus:-

    "Freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for proper functioning of the processes of popular government, is possible."
80. The Supreme Court of Canada in *Edmond Journal (supra)* put the matter beyond debate when it emphatically held that:-

    "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and inhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over emphasized."
81. We adopt the above holdings and findings and all the others cited by the Applicant and Amici but closer home, in the case of *Cord vs. the Republic of Kenya and Others*

*H.C. Petition No.628 of 2014,* the High Court of Kenya as a Constitutional bench of 5 Judges stated as follows on the rights to a free media and freedom of expression:-

1. "It may be asked: why is it necessary to protect freedom of expression, and by extension, freedom of the media? In General Comment No.34 (CCPR/C/GC/34) on the provisions of Article 19 of the ICCPR, the United Nations Human Rights Committee emphasises the close inter-linkage between the right to freedom of expression and the enjoyment of other rights. It observes at Paragraphs 2 and 3 as follows:
2. Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.
3. Freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.

82. The Court went further to state that:-
"The importance of the freedom of expression and of the media has been considered in various jurisdictions, and such decisions offer some guidance on why the freedom is considered important in a free and democratic society. In *Charles Onyango-Obbo and Anor v. Attorney General (Constitutional Appeal No.2 of 2002..)*, the Supreme Court of Uganda (per Mulenga SCJ) stated that:-
"Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that are in line with J. J. Rousseau's version of the Social Contract theory. In brief, the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison dêtre* of the State is to provide protection to the individual citizens. In that regard, the State has the duty to facilitate and enhance the individual's self-fulfilment and advancement, recognising the individual's rights and freedoms as inherent in humanity…
Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance".
83. We agree with the Learned Judges and in applying all the above principles to the present Reference, a number of issues must be pointed out.
84. Firstly, under Articles 6(d) and 7(2), the principles of democracy must of necessity include adherence to press freedom.
85. Secondly, a free press goes hand in hand with the principles of accountability and transparency which are also entrenched in Articles 6(d) and 7(2).
86. Thirdly, by acceding to the Treaty and based on our finding above that Articles 6(d) and 7(2) are justiciable, Partner States including Burundi, are obligated to abide and adhere by each of the fundamental and operational principles contained in Articles 6 and 7 of the Treaty and their National Laws must be enacted with that fact in mind. In stating so, we have previously held that whereas this Court cannot superintend the

organs of Partner States in the ways they enact their Laws, it is an obligation on their part not to enact or sustain laws that completely negate the purpose for which the Treaty was itself enacted – See *Mohochi (supra)*

87. Having said so, what is the test to be applied by this Court in determining whether a National Law, such as the Press Law, meets the expectations of the Treaty? The Treaty gives no pointer in answer to this question but by reference to other courts, it has generally been held that the tests of reasonability and rationality as well as proportionality are some of the tests to be used to determine whether a law meets the muster of a higher law. In saying so, it is of course beyond peradventure to state that Partner States by dint of Article 8(2) of the Treaty are obligated to enact National Laws to give effect to the Treaty and to that extent, the Treaty is superior law.
In that regard, in the *CORD Case (supra)*, the Learned Judges stated as follows:-
"We are guided by the test for determining the justiciability of a rights limitation enunciated by the Supreme Court of Canada in the case of *R vs. Oakes (1986) ISCR 103* to which CIC has referred to the Court. The first test requires that the limitation be one that is prescribed by law. It must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited.
Secondly, the objective of the law must be pressing and substantial, that is it must be important to society: see *R. vs. Big Drug Mart (1985) ISCR 295*. The third principle is the principle of proportionality. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. Put another way, whether the legislation meets the test of proportionality relative to the objects or purpose it seeks to achieve: see *R. Vs Chaulk (1990) 3, SCR 1303*.
If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test. They must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations. Secondly, they must limit the right or freedom as little as possible, and their effects on the limitation of rights and freedoms are proportional to the objectives."
88. We shall apply the above test as we interrogate each of the five areas of concern raised by the Applicant as regards the Press Law.
89. We deem it appropriate to address each of them as framed and very well-articulated by Learned Counsel for the *Amici Curiae*.

**I. Accreditation Regime**

90. Articles 5-7 of the Press Law provide for accreditation of journalists but the main complaint made is that whereas accreditation per se is not objectionable, it is the manner of implementation of the law that is problematic. It has been argued by the Applicant in that regard that the National Communications Council combines the role of prosecutor, judge and enforcer in one body and exercises wide power over the media and individual journalists.
91. On our part, while we quite understand the complaint, we have no more than bare submissions on the point. We so say because, while accreditation per se cannot be a bad thing and where all that is required is details of a journalist's educational

background and all other information regarding him, we also heard the Applicant to be saying that in the execution of the law, the National Communications Council has wide powers but that is all that was said. As to how those powers are amenable to abuse, we do not know and in submissions, neither the authorities cited nor the submissions themselves remove the whole issue from the realm of conjecture.

92. In any event, what is undemocratic and where is the violation of freedom of the press when a journalist is for example issued with a "press pass?" (See Article 5 of the Press Law). Article 7 of the Law gives the reason for the press pass as being an entitlement "to access all places where journalists are required to perform their job of obtaining information" and that with the press pass, journalists "have access to areas reserved for the press, to stadiums, airports, Court rooms in Court and Tribunals and generally speaking, are authorised to enter all official or public events."
93. As for accreditation, it is restricted to "any foreign journalist wishing to cover one or several activities taking place on the territory of Burundi." One fails to see the basis for the complaint in this regard. Accreditation in our view is a purely technical and administrative registration procedure for foreign journalists – (see *Scanlon & Holders*). In the circumstances, it cannot amount to a violation of the freedom of the press.
94. Returning to the role of the National Communications Council, in Article 9 of the Press Law, "it reserves the right to refuse or withdraw accreditation from journalists who abuse the facilities granted to them." Where is the violation of the freedom of the press when the Council can only act in the event of abuse by the particular journalist? Freedom of the press has never been an absolute right in any democracy and the present limitation is reasonable and justifiable. In the circumstance, we see no violation of Articles 6(d) and 7(2) as claimed with regard to accreditation of foreign journalists who wish to cover any activity in Burundi.

**II. Content-Based Restrictions:**

95. Articles 17-19 of the Press Law are in Section 2 of that Law under the sub-title, "Duties of Journalists." The Applicant's complaint relate to the duties imposed on a journalist:-
    i) to communicate only balanced information, the sources of which have been rigorously checked – Article 17;
    ii) to refrain from publishing or broadcasting information which contravenes national unity, public order and security, morality and common decency, honour and human dignity, national sovereignty, privacy, individuals and presumption of innocence – Article 18;
    iii) not to disseminate information which relate to national defence secrets, the stability of the currency, privacy (including personal and medical files), confidentiality of a legal investigation at the pre-trial stage, affronts and insults against the Head of State, calls and advertisements that incite revolt, civil disobedience, unauthorised demonstrations, defend crimes, blackmail or fraud, racial ethnic hatred, defamatory, insulting, libellous, offensive articles or reports regarding public or private persons, propaganda against Burundi, information that may harm the credit of the state and national economy, information

concerning military operations, national defence, diplomacy, scientific research and reports of commissions of inquiry by the State, identity of rape victims, protection of minors against obscene and/or images and debates held in closed session concerning minors without prior authorisation - Article 19.

96. We must note from the outset that of all aspects of the Press Law, this part caused us great concern. We say so because while some parts of it are obviously reasonable and require no more than the justification outlined in the language used, other provisions are less clear. For example, the restrictions on protection of minors and identity of rape victims can hardly be faulted and so are those that require communication of balanced information the sources of which have been rigorously checked. The latter is what is required of any professional including a journalist and the fact that it has been made into law cannot be an unreasonable provision.
97. Our difficulty is with the provisions that relates to say, stability of the currency, reports of commissions of enquiry etc. What justification and what plausible reason can justify such provisions in any law? In our view, citizens of any democratic State should be entitled to information that informs their choices in matters of governance. The above restrictions appear to unduly deny that right.
98. The Respondent never addressed us on this issue and in such a situation, we are reminded of the words of Iain Currie and Johan de Waall who in *Bill of Rights Handbook* stated thus:-

"Freedom of speech is valuable, not just by virtue of the consequences it has, but because it is an essential and 'constitutive' feature of a just political society that government treat all its adult members … as responsible moral agents. That requirement has two dimensions. First, morally responsible people insist on making up their own minds what is good or bad in life or in politics, or what is true and false in matters of justice or faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hold opinions that might persuade them to dangerous or offensive convictions.

We retain our dignity, as individuals, only by insisting that no one – no official and no majority has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it."

99. We also agree with the submissions by the Amici Curiae that where restrictions are placed on the enjoyment of any right, the same must be reasonable and the restriction must also be rational. What is the reason and rationale preferred for some of the restrictions above? We see none and in *S. vs. Mamabolo [2001] ZACC 17, Kriegler J.* stated as follows:-

"Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute

to outlaw any form of thought-control, however, respectably dressed."

100. What we understand the Learned Judge to have been saying, and we agree, is that a government should not determine what ideas or information should be placed in the market place and information and we dare add, if it restricts that right, the restriction must be proportionate and reasonable. We have grave doubts about some of the aspects of the Press Law in applying that test.

101. In that regard the following restrictions, in our view, cannot face the test of reasonability, rationality or proportionality i.e. the restriction not to disseminate information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of Inquiry by the State.

102. Despite a blanket concern therefore by the Applicant about Articles 17, 18 and 19 of the Press Law, noting the circumstances and history of the State of Burundi, and noting that freedom of speech and freedom of the press are not absolute, only the above provisions can properly be said to be unduly restrictive of these rights and we have said why.

103. In the circumstance, while we find good reason to uphold some of the provisions in Articles 17-19 of the Press Law, some of those provisions cannot pass the test we set out above and are therefore in violation of Articles 6(d) and 7(2) to that extent only.

104. We therefore find and hold that "the restrictions not to disseminate information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of Inquiry by the State" in Article 19 of the Press Law are in violation of the principles enshrined in Articles 6(d) and 7(2) of the Treaty.

**III. Right of Reply and Correction**

105. Chapter.VI of the Press Law is headed "The Right of Reply, Correction and Redress."

106. On this point, we shall spend very little time because looking at the authorities cited by both the Applicant and the *Amici Curiae*, it is our view that in the market place of ideas, if a person is prejudiced in any way by a publication (as is the language of Article 48 of the Press Law), there is good reason to entitle that person to a reply, correction and if need be, a redress.

107. Elsewhere above, we have indicated that we find no fault with any law that requires a journalist to publish any accurate information. In the event that he does not, then Chapter VI of the Press Law protects a party prejudiced by such inaccurate reporting. Such a party should, as a maxim of democracy, be entitled to a right of reply.

108. In any democracy, even victims have rights and we see no violation of Articles 6(d) and 7(2) of the Treaty as alleged on this issue.

**IV. Disclosure of Confidential Sources**

109. Article 20 of the Press law obligates journalists to "reveal their sources of information before the competent authorities" in situations where the information relates to State security, public order, defence secrets and the moral and physical integrity of one or more persons.

110. On this issue, we are of the same mind as the Court in *Goodwin vs. UK (supra)* where it was stated as follows:-

"Protection of journalistic sources is one of the basic conditions for press freedom .... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."

111. We have taken the above position because whereas the four issues named are important in any democratic state, the way of dealing with State secrets is by enacting other laws to deal with the issue and not by forcing journalists to disclose their confidential sources.

112. As for the issue of moral and physical integrity of any person, the obligation to disclose a source is unreasonable and privacy laws elsewhere can be used to deal with the matter. There are in any event other less restrictive ways of dealing with these issues.

113. We have no hesitation in holding that Article 20 does not meet the expectations of democracy and is in violation of Articles 6(d) and 7(2) of the Treaty.

**V. Fines and Penalties**

114. The contested fines and penalties are contained in Chapter VII of the Press Law which is headed, "Penalties and Punishments for Press Offences."

115. It has been agreed that the Constitutional Court in its Judgment of 7th January, 2014 determined that "Articles 61, 62, 67 and 69" of the Press Law were unconstitutional and to that extent, we find that any reference to those Articles is misguided.

116. In submissions however, the Applicant argued that the sentences meted out for breach of any provision of the Press Law are "disproportionately harsh", as did the *Amici*.

117. On our part, we find it very difficult to make a finding over penalties and fines. We say so because a comparative analysis of the offences in Burundian Criminal Law has not been made by the Applicant neither can we. We cannot substitute our subjective thinking based on submissions alone to determine that say BIF 2,000,000 is an exorbitant figure if imposed as a fine.

118. While therefore, the principle that an offence must attract a penalty comparable to its gravity is agreeable to us, in the present Reference, the context in the making of such a finding is lacking and in that event, we are unable to determine that there is any violation of Articles 6(d) and 7(2) of the Treaty.

119. In conclusion on Issue (b), we find that only the following Articles of the Press Law do not meet the expectations of Articles 6(d) and 7(2) of the Constitution:-

- Article 19(b), (g)(i) and part of (j), which lay down a broad set of restrictions of

what may be published by the media in Burundi and we have indicated the extent to which they violate the Treaty;

- Article 20, which requires journalists to disclose confidential sources of information;

Whether the Applicant is Entitled to the Reliefs Sought

120. We have addressed all the issues placed before us for determination and turning back to the prayers sought, in prayers (i) and (ii), the Applicant sought orders that this Court should:-

i) Declare that the Burundi Press Law violates the right to press freedom and thereby constitutes a violation of Burundi's obligation under the Treaty to uphold and protect the Community principles of democracy, rule of law, accountability, transparency and good governance as specified in Articles 6(d) and 7(2) of the Treaty; and

ii) Declare that the Burundi Press Law violates the press' right to freedom of expression and thereby constitutes a violation of Burundi's obligation under the protect human and peoples' rights standards as specified in Articles 6(d), 7(2)of the Treaty.

121. We have found that certain provisions of the Press law offend the principles in Articles 6(d) and 7(2) of the Treaty and we shall make appropriate orders in that regard.

122. In prayer (ii), the Applicant sought orders that this Court should:-

"Order Government of Burundi to, without delay:

a) Repeal the Press Law; or

b) Amend it in accordance with Burundi's obligations as specified in Articles 6(d) and 7(2) of the Treaty by striking out of or amending Articles 5 to 10, 17 to 20, 26 to 35, 44 to 46, 48 to 54, 56 to 66 and 66 to 69 of the Press Law."

123. We have read the Treaty and particularly Article 27(1) thereof. Having found the Press Law wanting in the above respects, we find and hold that we have no jurisdiction to give any orders as prayed above but we shall instead direct the Republic of Burundi, within its internal legal processes to implement this Judgment under Article 38(3) of the Treaty.

124. As for costs, none were sought by the Applicant, but the Respondent did so. Our finding is that no party should benefit from costs as the matters in issue were for the benefit of the wider public and falls in the category of public interest litigation.

**Final Orders**

125. Having found as above, the final orders to be made are as follows:-

i) Prayers (i) and (ii) of the Reference are granted in the following terms only:-

a) It is hereby declared that Article 19(b), (g), (i) and part of (j) of the Burundian Law No.1/11 of 4th June 2013 amending Law No.1/025 of 27th November 2003 which restrict dissemination of information on the stability of the currency, offensive articles or reports regarding public or private persons, information that may harm the credit of the State and national economy, diplomacy, scientific research and reports of Commissions of inquiry by the State are in violation of the principles enshrined in Articles 6(d) and 7(2) of the Treaty.

b) It is hereby declared that Article 20 of the Burundian Law No.1/11 of 4th June 2013 amending Law No.1/025 of 27th November 2003 to the extent that it obligates journalists to reveal their sources of information before the competent authorities in situations where the information relates to offences against State security, public order, State defence secrets and against the moral and physical integrity of one or more persons is in violation of Articles 6(d) and 7(2) of the Treaty.
c) The Republic of Burundi shall, in accordance with Article 38(3) of the Treaty take measures, without delay, to implement this Judgement within its internal legal mechanisms;
d) Prayer (iii) in the Reference is dismissed; and
e) Each Party shall bear its costs.

Orders accordingly.

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East African Court of Justice – First Instance Division
Reference No.8 of 2013

**Patrick Ntege Walusumbi, Dan Ssenga & Mohammed Waiga**

**And**

**The Attorney General of the Republic Uganda, The Attorney General of the Republic of Kenya , The Attorney General of the United Republic of Tanzania , The Attorney General of the Republic of Rwanda , The Attorney General of the Republic of Burundi & The Secretary General of the East African Community**

Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J: Monica Mugenyi, J & Fakihi A. Jundu J
Februar 27, 2015

*Human rights abuses - Membership of the East African Community - South Sudan's application for membership - Summit's discretionary mandate on membership - The prerogative of the Partner States - Whether the Reference disclosed a cause of action.*

*Articles: 3, 6, 27, 29 and 30 of the Treaty - Articles 3(3) and 4(6): of the Protocol for Admission to the East African Community - Council of Ministers' decision.*

The Applicants are traders trading in the Republic of South Sudan vide their company known as the Uganda Traders Association of South Sudan Ltd. They filed this Reference opposing the Republic of South Sudan's application for membership of the East African Community on the grounds *inter alia* that: the Government of the Republic of South Sudan had admitted to human rights violation/abuses and that this had been corroborated by the Report of the Verification Committee on the application of the Republic of South Sudan to join the East African Community. They sought a declaration that the Republic of South Sudan was not a fit and proper country to be granted membership in the East African Community.

The Respondents claimed *inter alia* that: the Court lacked jurisdiction to entertain and determine issues relating to a State that is not a member of the East African Community; that the Applicants had no cause of action against the Partner States of the East African Community; and the decision whether or not to grant membership to the Republic of South Sudan was the prerogative of the Partner States.

**Held:**

1) The question whether the directives or decisions of the Summit on 30th November, 2012, contained in the 14th Communiqué amounted to an infringement of Articles 3(2), (3)(b), (c), (e), (f), 6(d), 7(2) and 8(1)(c) as read with Articles 23 and 27(1) of the Treaty, were matters within the jurisdiction of the Court.
2) Once a foreign country applies for membership to join the Community, it would

come under the purview of Article 3(2) of the Treaty for purposes of "negotiations" with the Partner States. The Republic of South Sudan was brought into the picture or to the scene because it submitted its application for joining the Community under Article 3(2) of the Treaty. It is received as a foreign country "to negotiate" with the Partner States in accordance with the conditions and criteria set forth under Article 3(3) of the Treaty. Thus, the issue of extra-judicial jurisdiction did not arise if the substratum of the Reference is looked at and the alleged infringement of the Treaty is a matter within the jurisdiction of this Court.

3) Article 30(1) explicitly distinguishes between a decision and an action, delineating each of them as a basis for a cause of action thereunder. It does not draw any distinction between a final decision and a decision taken in the course of a process, but provides for both categories of decisions as constituting a basis for a cause of action. Therefore, a decision taken in the course of an ongoing process, subject to proof of intrinsic circumstances, was just as actionable as a final decision taken upon conclusion thereof.
4) The process under scrutiny duly complied with the Treaty and Protocol; the directive for the commencement of negotiations was grounded in the Summit's discretionary mandate as enshrined in Article 3(2) of the Protocol, and it did not contravene Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

**Cases cited:**
Attorney General of the Republic of Kenya v Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011
East African Law Society and 4 Others v. The Attorney General of the Republic of Kenya and 3 Others, EACJ Ref. No.3 of 2007
Samuel Mukira Muhochi v. Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011

**Judgment**

**Introduction**

1. This Reference, filed on 10th October, 2013 by the above named Applicants has been brought under Articles 3(2), 3(a), (b), (c), (f), 6(d), 7(2), 8(1)(c), 23, 27 (1) and 30 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rule 24 of the East African Court of Justice Rules of Procedure 2013 ("the Rules") seeking for a declaration and an order as herein below stated.
2. The Applicants are Ugandan traders trading in the Republic of South Sudan vide their company known as the Uganda Traders Association of South Sudan Ltd which initially was also one of the Applicants in this Reference until 5th September, 2014 when it was struck out for non-compliance of Rule 24(4) of the Rules. The Applicants' address for the purpose of this Reference is indicated as C/O Mr. Rwakafuuzi & Co. Advocates, Plot 7 Luvuma Street, Jafaali Kibirige House, and P.O. Box 26003, Kampala, Uganda.
3. The 1st to the 5th Respondents are the Attorney Generals of the Republic of Uganda, the Republic of Kenya, the United Republic of Tanzania, the Republic of Rwanda

and the Republic of Burundi, respectively, who are Partner States' Principal Legal Advisers, and are being sued on behalf of their respective Governments. The 6th Respondent has been sued pursuant to Article 4(3) of the Treaty as the Principal Executive Officer of the East African Community.

**Representation**

4. The Applicants were represented by Mr. Laduslaus Rwakafuuzi, Mr. Michael Maviki and Mr. Deo Mukwaya. The 1st Respondent was represented by Mr. Denis Bireije, Mr. Geoffrey Madete and Mr. Jeffrey Atwine; Mr. Lawrence Muiruri Ngugi, Ms. Barbara Wachira Claire and Mr. Timothy Kihara appeared for the 2nd Respondent; Ms. Sara Mwaipopo Mbuya, Mr. Mark Mulwambo, Mr. Harun Matagane, Ms. Adelaide Kasala, Ms. Aliseaa Mbuya, Mr. Abubakar Mrisha and Mr. Godfrey Matagane appeared for the 3rd Respondent; Mr. Aimable Malaala appreared for the 4th Respondent and Mr. Wilbert Kaahwa represented the 6th Respondent.

**Background**

5. The Reference filed by the Applicants has been prompted by the action of the Republic of South Sudan of applying to join as a member of the East African Community on 11th November, 2011. They allege that the Partner States are in their final stages of admitting the said country as a member of the East African Community and that the decision was slated on 4th April, 2014 as per the Statement by Hon. Shem Bageine, Chairperson of the East African Council of Ministers and the Minister of State for East African Affairs, Uganda, when he gave updates on the East African Community Affairs on 9th September, 2013 in Kampala.
6. The Applicants are opposing the application of the Republic of South Sudan to join the membership of the East African Community on the grounds stated herein below in the Applicants 'case.
7. The Applicants are therefore seeking the following reliefs:
   " a) A declaration that the Republic of South Sudan is not a fit and proper country to be granted membership in the East African Community; and
   c) An order that the Respondents should not grant membership to the Republic of South Sudan in the East African Community."

**The Applicants' Case**

8. The Applicants' case is contained in the Reference and is supported by an Affidavit deponed by one of the Applicants, Mr. Patrick Ntege Walisumbi. In addition to what has been stated in paragraphs 5 and 6 above, which should be read as part of the Applicants' case, the Applicants further contended that:-

a) The Affidavit deponed by the 1st Applicant in Annexure "A" shows that the Government of the Republic of South Sudan has admitted to human rights violation/ abuses and that the same has been corroborated by the Report of the Verification Committee on the application of the Republic of South Sudan to join the East African Community (Annexure 11 to the 6th Respondent's Response);
b) The conduct of the Republic of South Sudan as alleged seriously or gravely offends Articles 3(3) (a), (b), (c), (d), (e), (f),7(1), (2), and 8(1)(c) of the Treaty as far as it

violates human rights and social justice, reflects a flagrant rejection of the rule of law and good governance; and

c) Based on what is above stated, it follows that the directive of the Summit of EAC Heads of State made on 30th November, 2012 during the 14th Ordinary Summit authorising the Council of Ministers to commence negotiations with the Republic of South Sudan as regards its application to join the East African Community and the entire on-going process of negotiations with the said country, gravely offend the core principles of the Treaty as outlined in Articles 3(2), 3(3)(b), (c), (e) (f), 6(d), 7(1) and (2), and 8(1)(c) of the Treaty.

**The Respondents' Case**

9. The Respondents, in their replies to the Reference have vigorously opposed or resisted the Reference.

**The 1st Respondent Case**

10. The 1st Respondent's case was supported by the Affidavit deponed by Hon. Shem Bagaine, the Ugandan Minister of State for East African Affairs. He contended that:-
    "a) The Reference is premature, speculative, frivolous, unjusticiable, academic, abuse of Court process and bad in law because no decision or action has already been taken by the Partner States to admit the Republic of South Sudan in the East African Community;
    b) The Court is devoid of jurisdiction to entertain and determine issues relating to a state that is not a member of the East African Community;
    c) The Application by the Republic of South Sudan to join the East African Community as per requirements of Articles 3 of the Treaty has been appropriately considered by various Summits held by Heads of State of Partner States. Investigations and verifications have been carried out as per criteria and considerations set out in Article 3(3) of the Treaty."
11. However, the 1st Respondent further contended that a decision to whether the Republic of South Sudan is a fit and proper country to be granted membership of the East African Community can only be taken after the verification process has been completed and the recommendations thereof have been accepted by the Summit of the Heads of State. It is thus his contention that since no decision has been made to date, there is no basis for the Applicants' allegation of violation of the provisions of the Treaty.

**The 2nd Respondent's Case**

12. The 2nd Respondent's grounds for opposing the Reference were similar to those presented herein above by the 1st Respondent. It was, however, his further contention that the Applicants have failed to establish a case of violation of the Treaty in the assumption of the mandate to receive and consider an application for admission of a foreign State into the East African Community or in the procedure entailed in consideration. He maintained that the Respondents have demonstrated adherence and fidelity to the letter and spirit of the Treaty in the course of the process being undertaken by the relevant Organs of the East African Community.

**The 3rd Respondent's Case**

13. The 3rd Respondent's case was supported by the Affidavit deponed by Mr. Mark Eldad Mulwambo, Senior State Attorney at the Attorney General's Chambers, The United Republic of Tanzania. In addition to the abovementioned grounds for opposing the Reference presented by the 1st and the 2nd Respondents, the 3rd Respondent contended that the Applicants did not have a cause of action against the Partner States of the East African Community.
14. He further contended that the on-going process on whether or not to grant membership of the East African Community to the Republic of South Sudan is the prerogative of the Partner States based on the Treaty's requirements, terms and conditions and that, however, such decision has not yet been made to date. The 3rd Respondent was therefore of the view that any statement made at any briefing meeting or press conference by any responsible Minister or member or employee of the East African Community cannot be treated as an ultimate decision of the East African Community.

**The 4th Respondent's Case**

15. The 4th Respondent's Reply opposing the Reference was supported by the Affidavit deponed by Hon. Johnson Busingye, the Attorney General of the Republic of Rwanda. He opposed the Reference on the same grounds as those presented above, and contended that a decision on the Republic of South Sudan's application to join the East African Community can only be taken after the verification process is completed and the recommendations thereof accepted by the Summit of the Heads of State of the East African Community.

**The 5th Respondent's Case**

16. The 5th Respondent's case was supported by the Affidavit of Mr. Sylvester Nyandwi, the Permanent Secretary in the Ministry of Justice of the Republic of Burundi. His Reply opposing the Reference was based on the same arguments as those advanced above by the 1st to the 4th Respondents.

**The 6th Respondent's Case**

17. The 6th Respondent's Reply to oppose the Reference was supported by the Affidavit deponed by Ambassador Dr. Richard Sezibera, the Secretary General of the East African Community. A part from similar grounds for opposing the Reference as those presented above by the other Respondents, the 6th Respondent further contended that "currently, the process of negotiations between the Republic of South Sudan and the East African Community on the matter has not started, therefore, a decision on admission or non-admission of the said country has not been made;
    Based on the aforesaid, it follows that the Applicants' case is based on speculation and conjecture and is to that extend frivolous, vexatious and an abuse of Court process."
18. It was the 6th Respondent's contention therefore, that taking into account the roles, functions and responsibilities entrusted by the Treaty to different Organs of the East African Community, granting of orders sought by the Applicants does not arise.

**Scheduling Conference**

19. A Scheduling Conference was held on 5th September, 2014 whereby all the Parties were present save for the 5th Respondent. As it will be seen later on, the said Respondent did not file any submission nor did he attend the hearing date (12th November, 2014).
20. At the said Scheduling Conference, the following were the main points of agreement by the Parties:-
    a) The Republic of South Sudan has applied to join the East African Community;
    b) The consideration of the application of the Republic of South Sudan to join the East African Community is still on-going and no final decision has been taken by the Summit;
    c) There are triable issues based on the provisions of Article 3, 6, 27, 29 and 30 of the Treaty;
21. The following were disagreed matters or issues for determination by this Court:-
    1. Whether or not this Honourable Court is vested with jurisdiction to entertain the Reference;
    2. Whether the Reference discloses a cause of action taking into account the provisions of Article 30(1) of the Treaty;
    3. Whether the on-going process of considering the application of the Republic of South Sudan to join the East African Community violates the provisions of Articles 3(a), (b), (c), (f), 6(d), 7(2) and 8(1)(c) of the Treaty; and
    4. Whether the Applicants are entitled to the orders sought.
22. As to prayers, the Applicants prayed for orders sought in the Reference while all the Respondents prayed for dismissal of the Reference with costs.

**Determination of Issues**

Issue No.1: whether or not this honourable court is vested with jurisdiction to entertain the Reference

23. Each Party has canvassed the above issue by way of written submissions. In the following paragraphs, we reflect on the various arguments made by the Parties in their submissions on Issue No.1 as well as our determination thereon.

**Applicants' submissions**

24. The Applicants contended that the Court is vested with jurisdiction to entertain the Reference and have argued that:-

    "The Reference seeks from this Court the interpretation and application of the provisions of the Treaty against the directive or decision of the Summit authorizing negotiations to commence with the Republic of South Sudan whose human rights violation, as explained, allegedly offends or infringes core principles of the Treaty in Articles 3(3), (b), (c), (e), (f) 6(d), 7(2) and 8(1) (c);

    It is the said infringement of the core principles of the Treaty that consequently forms the legal foundation on the jurisdiction of this Court under Articles 23(1), 27(1) and 30(1) of the Treaty to entertain and determine the Reference.

    The Court has held in past various decisions that the provisions of the Treaty require strict compliance and their breach or infringement vests the Court with jurisdiction

under Articles 23(1) and 27(1) for application and interpretation of the same." The decision in *Samuel Mukira Mohochi vs. Attorney General of the Republic of Uganda, EACJ Reference No.5 of 2011* was cited in support of that proposition.

25. The Applicants further argued that "The Reference is not meant to determine whether or not the Republic of South Sudan committed human rights violations but calls upon this Court not to countenance the behavior or action of the EAC Summit to direct commencement of negotiations with the Republic of South Sudan in disregard of the report of the Verification Committee which concluded that the Republic of South Sudan does not adhere to the core principles enshrined in the Treaty; and
"The Court has the responsibility to ensure that such core principles are upheld by the EAC Partner States." In that regard, the decision in *James Katabazi and 22 Others vs. Secretary General of the East African Community and Attorney General of Uganda, EACJ Reference No.10 of 2007* was cited.
26. In response to submissions by the Respondents, the Applicants further submitted that "in considering grant of membership to a foreign country, Article 3(3) of the Treaty provides for conditions to be met by the foreign country. Those conditions include *inter alia* geographical proximity and inter dependence between it and the Partner States and adherence to universally accepted standards of human rights and social justice. That in applying those conditions, the Summit in its 13th Communiqué rejected the application of the Republic of South Sudan because of lack of geographical proximity and therefore, the Republic of South Sudan upon that rejection, should not have been allowed to proceed to the "negotiations level" as authorized by the Summit on 30th November, 2012 as it had already failed to meet one requisite condition under Article 3(3)(d) of the Treaty; and
The directive of the Summit issued on 30th November, 2012 for commencement of negotiations with the Republic of South Sudan constitutes an infringement within the meaning of Article 30(1) of the Treaty and the said decision was legally wrong as it disregarded or infringed the conditions set out in Article 3(3)(b) of the Treaty.
27. Further, that the Republic of South Sudan on its own admission and as corroborated by the Verification Report, was in violation of the principle of adherence to acceptable standards of human rights and is therefore guilty of non-adherence with the core principles enshrined under Article 3(3)(b) of the Treaty. The Summit ought therefore to have rejected the application of the Republic of South Sudan as it did when the said country failed to meet the conditions set out in Article 3(3) (d) with regard to geographical proximity. It is the said breach or infringement of the said Article that provides this Court with the jurisdiction to entertain the Reference, so submitted the Applicants.

**The Respondents' Submissions**

28. Each Respondent filed separate submissions with regard to Issue No.1.and on its part, the 1st Respondent submitted that the declarations and orders sought by the Applicants are a prerogative of the Summit under the Treaty as far as granting of membership to a foreign country is concerned and is not delegable to another Organ. That to do so would violate the principle of separation of powers and the Nigerian decision of Hon.Abdallah Macciado Ahmed vs Sokoto State House of Assembly and

Anor (2004 ) 44 WRN 52 was cited in that regard.

29. He further submitted that " to grant the declarations and orders sought by the Applicants, will be to condemn the Republic of South Sudan unheard about all the allegations of human rights violation by the Applicants and to do so would amount to the Court acting against the maxim of audi alteram partem (no party should be condemned unheard).
"The granting of the reliefs sought by the Applicants implies that a finding and decision has been made by the Summit on the issue and yet to-date, no final decision has been made on the matter and so the Reference is speculative and moot."
30. On its part, the 2nd Respondent submitted that;
"The question of admission or non-admission of a foreign country to the membership of the Community is a prerogative of the Summit under Article 11(9)(c) of the Treaty and involves a set criteria, terms and conditions laid down in Article 3 of the Treaty as well as policy issues, balance of best interests, political considerations, and relations with foreign countries, all of which the Court is ill suited to adjudicate upon."
31. He further submitted that under the principle of separation of powers and justiciability, the nature and the subject matter involving negotiations between the Partner States and the Republic of South Sudan are not amenable to the judicial process and in that regard, *R vs. the Secretary for the Home Department ex Parte Bentley (1994) 12, 13, 349 as well as Samuel Muigai Nga'ng'a vs. the Minister for Justice, National Cohesion & Constitutional Affairs and Another [2013] eKLR* were cited.
32. The 2nd Respondent further argued that the jurisdiction of the Court is conferred under Articles 23(1) and 27(1) of the Treaty on the interpretation and application of the Treaty. It has no jurisdiction to deal with allegations of violation of human rights alleged by the Applicants and it has no jurisdiction to adjudicate in a matter involving a foreign country which is not a member of the East African Community such as the Republic of South Sudan.
33. He finally submitted that the mandate of entering into negotiations for membership of a foreign country in the Community is entrusted on the Summit under Articles (3)(2) of the Treaty as well as the powers of admission thereof under Article 11(9)(c ) and those powers are not delegetable. Such powers are in any event of a political nature and involve political value judgment not suitable for judicial adjudication. The case of *Oetjen vs Central Leather Company 246 U.S 297* was cited to support that submission.
34. On its part, the 3rd Respondent agreed with the above submissions and added that the allegation that the Republic of South Sudan is involved in human rights violations is a matter for the domestic courts of that country and not this Court.
35. The 4th Respondent on its part, while adopting the submissions of the Respondents, added that allegations of rape, murder, torture etc. allegedly committed by citizens of the Republic of South Sudan against members of the Applicants' company cannot be entertained by this Court as South Sudan is not a member of the Community.
36. The 6th Respondent submitted *inter alia* that although the Court has held in various past decisions that it is vested with jurisdiction under Articles 23(1), 27(1) and 30(1) to apply and interprete Treaty provisions, the Applicants in their Reference, supporting Affidavit and submissions have not shown or demonstrated that the Respondents, in

handling the application of the Republic of South Sudan, have infringed or ran afoul of Article 3 of the Treaty so as to invoke the jurisdiction and authority of the Court.

**Determination on Issue no.1**

37. It is not in dispute that at least four steps or stages are necessary in the consideration of an application to join the East African Community. They are the following :-
    i) Application by the foreign country;
    ii) Verification of the application for conformity with the conditions under Article3 (3) of the Treaty;
    iii) Negotiations as to the nature, extent or type of membership to be granted; and
    iv) Granting of the membership.
38. It is also agreed that as far as the application of the Republic of South Sudan to join the East African Community is concerned, no final decision has been made by the Summit. At each of the above stages, the Summit is expected to make a decision one way or the other and Annexes 1 to VIII annexed to the 6th Respondent's Response to the Reference are Minutes or Communiqué records of the various meetings of the Summit in which the issue of the application of the Republic of South Sudan has been dealt with. In each meeting, the Summit has given various decisions or directives to the Council of Ministers in respect of the said application.
39. In our considered view, the question whether the directives or decisions of the Summit on 30th November, 2012, as contained in the 14th Communiqué amount to an infringement of Articles 3(2), (3)(b), (c), (e), (f), 6(d), 7(2) and 8(1)(c) as read with Articles 23 and 27(1) of the Treaty, is a matter within the jurisdiction of this Court. In *Samuel M. Muhochi [supra]* this Court stated as follows:-
    "What matters in our considered opinion, is that the application seeks that this Court determines whether the actions and decisions of the Respondents were an infringement of specific Treaty provisions. It is the interpretation and application of these provisions in order to determine whether the impugned action and decisions are infringement that provides the jurisdiction of the Court under Article 27(1)."
40. We hold the same view in this Reference and accordingly, we must agree with the Applicants on the issue of jurisdiction.
41. As regards the contention of the Respondents that the Republic of South Sudan is not a member of the East African Community and is therefore not bound by the Treaty and as such the Court has no jurisdiction to adjudicate on the allegations of human rights violations against the Ugandan traders including the Applicants trading in the said Republic, we have carefully considered the rival arguments of the Parties on the aforesaid point. First, we agree with the Respondents that the Republic of South Sudan is not a member of the East African Community and is therefore not bound by the Treaty. However, once a foreign country applies for membership to join the Community, it will necessarily have to come under the purview of Article 3(2) of the Treaty for purposes of "negotiations" with the Partner States. For avoidance of doubt, the said provision states as follows:-
    "The Partner States may, upon such terms and in such manner as they may determine, together negotiate with any foreign country the granting of membership to, or association of that country with, the Community or its participation in any of the activities of the Community."

42. In that context, and looking at the Reference before us, the challenge by the Applicants is on the aforesaid directive by the Summit of the Heads of State issued on 30th November, 2012 rather than the fact that the Republic of South Sudan is or is not a member of the East African Community. The said directive was made by the Summit which is an Organ of the East African Community and is a decision amenable to the jurisdiction of this Court under Article 30(1) of the Treaty.
43. Further, we quite agree with the Applicants that in this Reference, the Republic of South Sudan is not on trial for alleged human rights violations committed against the Ugandan traders in the said country. Article 27(2) of the Treaty cannot therefore be invoked to deny this Court jurisdiction as alleged by the Respondents. In any event, as a general policy of the Court, which is in any event inapplicable to the present Reference, mere mention of human rights in a reference cannot be the basis of ouster of jurisdiction under Article 27(2) of the Treaty. That policy was what led the Court in *Samuel M. Muhochi [supra]* to state as follows;
"In particular, this Court has consistently held and the Appellate Division has consistently upheld, that mere inclusion of human rights violations in a Reference will not deter the Court from exercising its interpretation jurisdiction under Article 27(1) of the Treaty"
44. We reiterate that holding and without any hesitation, we shall hold and find that this Court is vested with jurisdiction to entertain this Reference and would therefore answer this issue in the affirmative.
Issue No.2: whether the reference discloses a cause of action taking into account the provisions of Article 30(1) of the Treaty

**The Applicants' Submission**

45. The Applicants, citing Article 30(1) of the Treaty, strongly contended that the Reference discloses a clear and concise cause of action. They argued that this Court has already pronounced itself that for a cause of action to be established under Article 30(1), it is not necessary to show a right or interest that has been infringed and/or damage that has been suffered as a consequence of the matters complained of in the Reference. That it is enough to state that the matter complained of infringes a provision of the Treaty in a relevant manner and reference was made to *Hon. Sitenda Sebalu vs. Secretary General of the EAC & 3 Others and EACJ Ref. No.1 of 2010, Prof Peter Anyang Nyong'o and Others vs. Attorney General of Kenya and Others, EACJ Ref. No.1 of 2008* in that regard.
46. The Applicants further contended that in the present Reference, their complaint is against the directive of the EAC Summit in their 14th Communiqué which authorized negotiations between the Council of Ministers and the Republic of South Sudan aiming at admitting the Republic of South Sudan into the East African Community. In their opinion, the said directive was illegal, null and void ab initio since the said country in a report compiled by the Ugandan Traders Association of South Sudan and in another report compiled by the Verification Committee set up by the Community was found not to accede, adhere or strictly observe the universally accepted principles of good governance, democracy, rule of law, observance of human rights and social justice.

47. Based on the aforesaid reports, the Applicants have argued that directive of the Summit above mentioned as well as the ongoing negotiations, generally and fundamentally infringe Articles 3(a), (b), (c), (e) and (f), 6(d), 7(1), (2) and 8(1), (c) of the Treaty, hence, in terms of Article 30(1) of the Treaty, it is clear that a cause of action has been established and calling for interpretation of the alleged infringed Articles. Further, the Applicants contended that they are natural persons residing in the Republic of Uganda who in terms of Article 30(1) of the Treaty have a locus standi to bring an action before this Court.
48. In their rejoinder to the Respondents' submissions as regards the Respondents' arguments that the Reference is speculative as no final decision has been made by the Summit, the Applicants contended that the process of admitting a foreign country into the Community under Article 3(2) and (3) of the Treaty involves at least four steps namely: (1) Application by the foreign country, (2) Verification of the application for conformity with the conditions under Article 3(3) of the Treaty, (3) Negotiations as to the nature, extent or type of membership to be granted and (4) Granting of the membership.
49. They submitted further that at each stage or step, the Summit makes a decision whether to advance or not to the next stage or step in the process. They further contended that in the present case, the Summit decided to advance from the verification step to the negotiation level and that decision or directive of the Summit constituted an abdication of, and amounted to a fundamental breach of the core principles of the Community under Article 3(3)(b) and therefore constitutes a cause of action under Article 30(1) of the Treaty.
50. As to the contention that the 6th Respondent is wrongly sued in the Reference, the Applicants submitted that the 6th Respondent is the Principal and the Accounting Officer of the Community under Article 67(3) of the Treaty and liable, in his representative capacity, for any actions of the Community. As for the Partner States, that they have been sued independently within the meaning of Article 3 of the Treaty as they had individually approved the improper directive through their respective Heads of State. That therefore, the Reference has been brought jointly and severally against them for the above reasons and the arguments of the 6th Respondent on the said point are erroneous and misleading.

**The Respondents' Submission**

51. The 1st Respondent in his submissions cited Article 30(1) of the Treaty in full as well as the decisions of this Court in *Prof. Peter Anyang' Nyong'o and Others vs. Attorney General of Kenya & Others, EACJ Ref. No.1 of 2006 and Legal Brains Trust (LBT) vs. Attorney General of Uganda, EACJ Appeal No.4 of 2012* to show how a cause of action is established under the Treaty. In relying on *Prof. Peter Anyang' Nyong'o, [supra],* the 1st Respondent was making the point that under Article 30(1), the Court is compelled to exercise its jurisdiction only where it is being called upon to determine 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 specific provisions of the Treaty. Further, he relied on the decision in *Legal Brains Trust (LBT) Limited [supra]*, to argue that under Article 30(1) of the Treaty,

a cause of action must be founded on the failure of a Partner State or an institution of the Community to apply the Treaty. He explained that the said Article opens the doors of the Court to any legal or natural person who is a resident of the Community and who wishes to challenge the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the basis that there is thereby a violation of a particular provision of the Treaty.

52. He however argued that on the contrary, what the Applicants claim to be a cause of action is the unfounded complaint that the Summit is bound to admit the Republic of South Sudan into the Community and that by so doing the Summit would be contravening the Treaty, but in truth, no decision to admit the Republic of South Sudan has been made by the Summit to date and to warrant the present Reference. Further, that it has not been shown that the Summit has failed to apply Article 3(3) of the Treaty or the procedures prescribed by the Council of Ministers under Article 3(3)(b) of the Treaty and therefore, the Reference is premature and does not disclose a cause of action under Article 30(1) of the Treaty.
53. On his part, and while agreeing with the 1st Respondent, the 2nd Respondent argued that the Reference targets the Summit which is an organ of the Community as per the definition in Article 1 of the Treaty while Article 30 as framed shows that proceedings under it can only be directed against a Partner State or an institution of the Community and not an organ of the Community such as the Summit. Secondly, that the power of admission of a foreign country is vested in the Summit under Article 11(9)(c) of the Treaty and not any Partner State and so there is no plausible cause of action against the Partner States. Thirdly, the Reference does not disclose any cause of action contemplated under Article 30(1) but merely consists of mere allegations against a legitimate process of an organ of the Community.
54. Fourthly, the 2nd Respondent contended that the Court's jurisdiction under Article 30 read together with Article 27 is delimited within the East African Community and the Court has no other extra territorial jurisdiction stretching to Non-member States. The Reference therefore, so far as it seeks the examination of the actions and institutions of the Republic of South Sudan, which is neither a member of East African Community nor a Party to this Reference, discloses no cause of action.
55. Fifthly, the 2nd Respondent contended that the allegations of human rights violations against Ugandan traders, including the Applicants, trading in the Republic of South Sudan have no justifiable cause before this Court. That such allegations should in any event be dealt with by institutions within the Republic of South Sudan or under settlement arrangements between the Ugandan Government, the Republic of South Sudan and the Applicants, through their company, the Ugandan Traders Association of South Sudan.
56. The 2nd Respondent lastly submitted that, negotiations between the Republic of South Sudan and the Partner States for admission of the said country into the East African Community does not fall under any of the categories of "Act, regulation, decision or action that is unlawful or an infringement of the provision of the Treaty under Article 3(1)" and therefore, the Reference discloses no cause of action against any member of the Community and should be struck out.
57. The 3rd Respondent, while admitting that the Applicants have established a cause of

action, generally, denied that they have a cause of action against him, specifically. That under Article 30(1) of the Treaty, any cause of action must be predicated upon alleged violations of the Treaty by an institution of a partner state and so such violations have been cited as against his office or any institution of his country.

58. It was also his argument that negotiations with The Republic of South Sudan for admission to the EAC cannot create a cause of action under Article 30 aforesaid.
59. The 4th Respondent as well as the 5th Respondents did not make any submissions on this issue but the 6th Respondent argued that, Article 30(1) of the Treaty and as was decided in *Prof. Peter Anyang' Nyong'o, [supra]*, envisages a statutory cause of action and not a cause of action as ordinarily found in tort or contract. Further, that in the *Sitenda Sebalu case [supra]*, this Court held that, "it is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner. This argument supports the existence of a cause of action,"
60. The 6th Respondent also cited the case of L*egal Brains Trust (LBT) Limited [supra],* where the Appellate Division held that:-

    "……under Article 30(1), the cause of action must be founded on the failure of a Partner State or an Institution of the Community to apply the Treaty. In the instant case, the Applicants did not complaint of any failure in the application of the Treaty, neither by a Partner State nor by an institution of the Community. Article 30 of the Treaty opens the doors of this Court to any legal or natural person who is resident in the Community and who wishes to challenge the legality of any Act, regulation, directive, decision or action that was alleged to have been made or taken in violation of the Treaty Particular Articles of the Treaty were mentioned as having been infringed".
61. That based on the aforesaid cited authorities, he admitted that the mere fact of occasioning a breach of the Treaty is in itself a cause of action and he does not deny the legal capacity under which the Applicants have come to this Court. However, he contended that, the matters that the Applicants have complained about (the directives to commence negotiations for the admission of the Republic of South Sudan into the Community), do not fall under the category of "Act, regulation, directive, decision or action that is unlawful or an infringement of the provisions of the Treaty" for purposes of constituting a cause of action under Article 30(1) of the Treaty.
62. That therefore, the decisions of the Court in the case of *Hon. Sitenda Sebalu,[supra]* and *Hon. Peter Anyang' Nyong'o [supra]* are distinguishable from the instant case in that in the said cases, the complaints were in respect of actions and decisions that had already taken place while in the present case, no decision has been made by the Summit to warrant any intervention by this Court.
63. The 6th Respondent further contended that the Applicants have made blanket allegations against all the Respondents as if they all have the same duties and obligations which is not true and in any event, Article 3 of the Treaty mandates Partner States to negotiate with any foreign country as to the grant of membership to the Community taking into consideration the matters under Article 3(3) of the Treaty and the said Article outlines the rights and duties of the Partner States. That in that context, the Applicants have failed to show how the Respondents have infringed the Treaty or what they had done or failed to do in terms of Article 3(2) of the Treaty for purposes of finding a cause of action against them.

64. For the above reasons, the Respondents pleaded that the Reference does not disclose a cause of action against them taking into account the provisions of Article 30(1) of the Treaty.

**Determination on Issue no.2**

65. The issue for consideration and determination is whether the Reference discloses a cause of action under Article 30(1) of the Treaty.
66. In our view, the Applicants' contention that the directive of the Summit on 30th November, 2012 infringes the various provisions of the Treaty, constitutes a cause of action under the provisions of Article 30(1) of the Treaty in not far-fetched subject to the merits of their contention being established later in this judgment. This view finds support in various past decisions of this Court and more so, H*on. Sitende Sebalu case [supra],* where this Court held that:-
"It is enough if it is alleged that the matter complained of infringes a provision of the Treaty in a relevant manner. This argument supports the existence of a cause of action."
67. Further, in *Attorney General of the Republic of Kenya and Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011*, the Appellate Division held that:-
"It is that alleged infringement which, through interpretation of the Treaty under Article 27(1), which constitutes the cause of action as a Reference."
68. In stating as above, the Applicants' case, brought in respect of the directive of the Summit made on 30th November, 2012 and contained in the 14th Communiqué, falls within the assertions of the said various decisions of this Court, that it is sufficient to allege an infringement of a specific provision of the Treaty, as the Applicants have done, so as to constitute a cause of action under Article 30(1) of the Treaty. In *Prof. Peter Anyang Nyong'o [supra]*, this Court explained that Article 30(1) of the Treaty, on which the Applicants have base this Reference, envisages a statutory cause of action and not a cause of action as ordinarily known in tort or contract and we maintain that principle as applicable to the present case.
69. As regards the contention that Article 30(1) of the Treaty does not envisage a reference against an organ of the Community, in our considered view, though there are various entities in the Community, all are united under the corporate status of the said body. That is why in *Samuel Mukira Muhochi[supra]*, this Court observed as follows:-
"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."
70. It follows therefore, that the attempt by the Respondents to show that in some Articles, the powers or functions are vested in distinct entities or not vested in some Respondents, is a narrow and restrictive outlook which may not be beneficial to the interpretation of Article 30(1) of the Treaty. In *the East African Law Society and 4 Others vs. The Attorney General of the Republic of Kenya and 3 Others, EACJ Ref. No.3 of 2007*, this Court stated as follows:-
"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 and adjudication where there is allegations of non-compliance, we are inclined to the view that a restrictive interpretation would defeat that purpose."

71. In the same decision, this Court stated further as follows:-
"Lastly, we are not persuaded by the Respondents urging us that we give to Article 30, a narrow interpretation that excludes from the application of that Article infringement by an organ of the Community. With due respect to the Learned Counsel, it seems to us that such a restrictive interpretation is not based on sound ground. It is only based on the fact that no mention of the infringement of the Treaty by an organ of the Community is made in Article 30"
72. We reiterate the above holdings and would only add that a restrictive interpretation of the Treaty is not prudent and we further hold that all the Respondents, including the 6th Respondent, cannot be excluded under Article 30(1) of the Treaty once an allegation of breach or infringement of the provisions of the Treaty have been made. It is a wholly different matter however as to whether in fact those allegations as made, are true or not.
73. There is another assertion by the Respondents that the Court's jurisdiction under Article 30 read together with Article 27 is de-limited within the East African Community and that there is no extra-territorial jurisdiction stretching to a non-member State. To our minds and as we have earlier stated, it is agreed that the Republic of South Sudan is not a member of the East African Community nor is it a Party to this Reference. We have also already stated that the Court in as far as this Reference is concerned, is called upon to deal with the alleged infringement of the mentioned Articles resulting from the mentioned directive of the Summit. Such an assertion is still within the territorial jurisdiction of the Court under Article 23(1), 27(1) and 30(1) of the Treaty. As we have already discussed earlier, the Republic of South Sudan is brought in the picture or to the scene merely because it submitted its application for joining the Community under Article 3(2) of the Treaty. It is received as a foreign country "to negotiate" with the Partner States in a accordance with the conditions and criteria set forth under Article 3(3) of the Treaty. The issue of extra-judicial jurisdiction does not therefore arise if the substratum of the Reference is looked at and we hold and find that the alleged infringement of the cited Articles of the Treaty is a matter to de dealt within the jurisdiction of this Court.
74. For avoidance of doubt, for a cause of action to be established under Article 30(1) of the Treaty, one only need to show that he is a resident of a Partner State; he is complaining about the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community and lastly, that the actions allegedly constitute a violation of the Treaty. In the present case, we have no doubt that the Applicants have discharged that burden.
75. Finally, for completion of our analysis of Article 30(1), we are constrained to address ourselves to the issue of prematurity of the Reference as raised by all the Respondents and specifically, the 1st, 2nd and 3rd Respondents. In that regard, we have already found that the consideration of the Republic of South Sudan's application to join the Community is ongoing and no final decision has been taken by the Summit. In fact, it would appear that the negotiations that were authorized by the Summit are yet to

commence.

76. We understood the Respondents to argue that an ongoing process per se was not actionable under Article 30(1) of the Treaty until a final decision had been taken. With respect, we would disallow this position. For ease of reference Article 30(1) 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 the Treaty."
77. Article 30(1) explicitly distinguishes between a decision and an action, delineating each of them as a basis for a cause of action thereunder. It does not draw any distinction between a final decision and a decision taken in the course of a process, but provides for both categories of decisions as constituting a basis for a cause of action. Therefore, it is our considered view that a decision taken in the course of an ongoing process, subject to proof of intrinsic circumstances, is just as actionable as a final decision taken upon conclusion thereof.
78. In conclusion, having analyzed the various arguments by the Parties under Issue No.2 and having given our considered view and position on the matter, we hold that the Applicants have persuaded and convinced us that a cause of action has been disclosed under the provisions of Article 30(1) of the Treaty. In short, their allegation that the directive of the Summit made on 30th November, 2012 as found in the 14th Communiqué infringes Articles 3(2), 3(3)(b), (c ), (e), (f), 6(d), 7(2) and 8(1)(c ) of the Treaty suffices to support the existence of cause of a action in this Reference. We would therefore answer this issue in the affirmative.
Issue No.3: whether the ongoing process of considering the application of the Republic of South Sudan to join the east African community violates the provisions of Articles 3(a), (b), (c), (e), (f), 6(d), 7(2) and 8(1)(c) of the Treaty

**The Applicants' Case**

79. The Applicants contended that the ongoing process of negotiations with the Republic of South Sudan as authorized by the Summit on 30th November, 2012, is null and void ab initio in as far as it infringes Articles 3(a), (b), (c), (f), 6(d), 7(1) & (2) and 8(1)(c). They further contended that the Report of the Uganda Traders Association of South Sudan (Annex. "A" to the Affidavit of the First Applicant) details human rights violations including rape, assault, torture, extra-judicial killings, false imprisonment as well as confiscation of merchandise committed against Ugandan traders by police and military officials of the Republic of South Sudan; that the said Report was corroborated by the Verification Committee's Report which *inter alia* observed that the Republic of South Sudan does not adhere to universally accepted principles of good governance, democracy, the rule of law, observance of human rights and social justice, and therefore the directive of the Summit on 30th November, 2012 authorizing negotiations aimed at admitting a State which does not adhere to the said principles was a threat to the rule of law and good governance within the EAC.
80. It was also the Applicants' contention that the foregoing principles were benchmarks for

a better integration among Partner States, as well as a safeguard against arbitrariness, dictatorship and anarchy. They cited the cases of *James Katabazi & 21 Others vs. The Secretary General of the EAC & The Attorney General of the Republic of Uganda EACJ Ref. No. 1 of 2007; Plaxeda Rugumba vs. The Secretary General of the EAC & Another EACJ Ref. No. 8 of 2010, and Samuel Mukira Muhochi vs. Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011* in support of their argument.

81. The Applicants also contended that the Summit's directive of 30th November 2012 amounted to a decision that was taken without regard to the provisions of Article 3(2) of the Treaty in so far as it sanctioned the commencement of negotiations with a country that was not in compliance with the conditions outlined in Article 3(3)(b). Learned Counsel argued that the 'negotiations' envisaged under Article 3(2) were only for purposes of determining the type of membership that could be offered to an Applicant that sought to join the EAC.

**The Respondents' Case**

82. It was argued for the 1st Respondent that the process for the consideration of the Republic of South Sudan's Application to join the EAC did not violate the provisions of the Treaty; rather, under Article 3(2) of the Treaty, matters relating to admission to the membership of the Community were the express mandate of the Partner States and this Court had no mandate to usurp that role or determine the propriety of countries that sought to join the Community.
83. The 1st Respondent further contended that, in exercise of their mandate, the Partner States were guided by the criteria, conditions and other considerations outlined in Articles 3(3) and 3(4) of the Treaty. That the burden of proof that the Respondents had acted outside the scope of Article 3(4) lay with the Applicants but had not been discharged.
84. The 1st Respondent did also contend that the present Reference was premature, having been filed prior to a decision on the admission of the Republic of South Sudan and in the absence of proof that such a decision had been taken without due regard to the considerations and criteria set out in Article 3 of the Treaty. It was learned Counsel's contention that a decision as to whether the Republic of South Sudan qualified to join the EAC could only be taken after the verification process was complete and recommendations thereof had been accepted by the Summit, before which there was no basis for an allegation of violations of Treaty provisions.
85. The 2nd Respondent re-echoed the submissions of the 1st Respondent above, contending that whereas the requisite provisions of the Treaty had been duly complied with by the Partner States, the Applicants had not impugned the legality of the Protocols or the procedures of the Community under which an Application for membership in the EAC could be considered or suggested that they violated the Treaty. Similarly, the 3rd and 4th Respondents re-echoed the 1st Respondent's submission on the prematurity of the Reference and the decision to admit a Country into the Community being the prerogative of the Partner States, contending that the laid down procedure had been duly complied with.
86. In the same vein, the 6th Respondent maintained that the procedure adopted by the Partner States had not been concluded so as to warrant the present Reference and

did not violate the provisions of the Treaty. With particular reference to Article 3 of the Treaty, the 6th Respondent contended that a violation thereunder could only arise where negotiations with a foreign country were undertaken in the absence of a formal application or a decision was taken without regard to the conditions stipulated in Article 3(3) of the Treaty. It was learned Counsel's contention that the Applicants had not discharged the burden of proof upon them in that regard.

**Determination on Issue No.3**

87. Articles 6(d), 7(2) and 8(1(c) provide as follows:-

Article 6(d)

"The fundaments principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:

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."

Article 7(2)

"The Partner States shall 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."

Article 8(1)(c)

"The Partner States shall:

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

88. The admission of new members into the East African Community is regulated by Article 3(2) of the Treaty. The Article provides:-

"The Partner States may, upon such terms and in manner as they may determine, together negotiate with any foreign country the granting of membership to, or association of that country with, the Community or its participation in any of the activities of the Community."

89. The parameters against which the foregoing function is performed are detailed in Articles 3(3), 3(4) and 3(6) of the Treaty. Article 3(3) of the Treaty provides as follows:-

"Subject to paragraph 4 of this Article, the matters to be taken into account by the Partner States in considering the application by a foreign country to become a member of, be associated with, or participate in any of the activities of the Community, shall include that foreign country's:

a) Acceptance of the Community as set out in the Treaty;
b) Adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human rights and social justice;
c) Potential contribution to the strengthening of integration with the East African region;
d) Geographical proximity to and inter-dependence between it and the Partnership State;

e) Establishment and maintenance of a market driven economy; and
f) Social and economic policies being compatible with those of the Community.

90. Article 3(4) of the Treaty provides as follows:-
"The conditions and other considerations that shall govern the membership or association of a foreign country with the Community or its participation in any activities of the Community shall be as those prescribed in this Article."

91. Article 3(6) reads:
"The procedure to be followed with respect to the foregoing provisions of this Article shall be prescribed by the Council."

92. The procedure in reference in Article 3(6) of the Treaty is then codified in the Protocol for Admission to the East African Community (hereinafter referred to as 'the Protocol'). It seems to us that the net effect of Articles 3(2) of the Treaty and 3(3) of the Protocol is to designate the admission of a foreign country into the Community as a function of the Summit.

93. Further, while Article 3(1) of the Protocol replicates verbatim the conditions for admission to the Community stipulated in Article 3(4) of the Treaty, Article 4(3), (4), (5), (6) and (7) of the same Protocol outlines the procedure to be adopted by the Council of Ministers and Summit in such admission. Article 4(3), (4),(5), (6) and (7) read as follows:-
"3. An application for granting of membership shall be included in the agenda of the Council;
4. The Council may, after due consideration of the application make an appropriate recommendation thereon, for the action of the Summit of Head of States;
5. In all cases, consideration of the admission of a member or associate member shall be included in the agenda of the Summit;
6. The Summit of the Head of States may, after due consideration of the recommendation by the Council, make a decision on the application; and
7. The decision of the Summit on the application shall be communicated to the applicant country by the Secretary General."

94. In the same vein, Article 4(1) of the Protocol provides for a foreign country that wishes to join the Community to submit an application in writing and Article 4(2) of the same Protocol provides for the communication of such application to the Partner States. Article 4(2) reads:-
"The Secretary General shall, on receipt of an application for membership, association or rights of participation in the activities of the Community communicate a copy thereof to all Partner States."

95. In the instant Reference, it is not in dispute that the Republic of South Sudan did submit such an application on 11th November 2011. We therefore find that Article 4(1) of the Protocol has been duly complied with. The 6th Respondent contended that the provisions of Article 4(2) of the Protocol were similarly adhered to. We find no counter evidence or arguments on this issue by the Applicants. We therefore find no reason to disallow the Respondents contention, and are satisfied that the said provision was duly complied with in the process under scrutiny.

96. Indeed, the 6th Respondent's affidavit evidence sought to demonstrate that the provisions of the said Protocol were duly complied with throughout the process with

regard to the Application by the Republic of South Sudan. The Applicants contested this on the premise that the 'negotiations' envisaged under Article 3(2) of the Treaty should only be held with a foreign country which has been verified and found prima facie to conform to the conditions set out under Article 3(3)(b) of the Treaty, but the Summit's directive for the commencement of negotiations with the Republic of South Sudan fell short of this in light of glaring evidence that the Republic of South Sudan did not meet the conditions set out thereunder. The Applicants further contended that the negotiations referred to in Article 3(2) of the Treaty only concern the nature, extent or type of membership to be granted to an applicant and not a determination of a foreign country's conformity with the conditions set out under Article 3(3) of the Treaty.

97. We have carefully considered the arguments of the Parties above against the law in reference. We find nothing in Article 3(2) of the Treaty that would warrant the restrictive interpretation posited by the Applicants. On the contrary, Article 3(2) explicitly provides for negotiations thereunder to be undertaken 'upon such terms and in such manner' as the Partner States may determine. We have established that the Protocol was promulgated under Article 3(6) of the Treaty to determine the manner in which admission of a foreign country into the Community would ensue. Article 3(3) thereof designated the Summit to make the decision as to such admission. The designated Organ (the Summit), on 30th November 2012, acting within its discretionary mandate, issued a directive for negotiations to commence with the Republic of South Sudan. It thus executed its mandate thereunder. If, for argument's sake, the Summit was willing to have the alleged human rights violations considered as negotiation points, that would clearly be its prerogative.
98. In any event, we are not persuaded by the contrary arguments advanced by the Applicants. In our considered view, reference to the different types of 'membership' in Article 3(2) denotes the possible levels of association with the EAC that are available to foreign countries. Indeed, the requirement in Article 4(1) of the Protocol for clarity as to the type of membership sought by such foreign country would serve to buttress this interpretation of Article 3(2) of the Treaty.
99. In the result, we are satisfied that the process under scrutiny duly complied with the Treaty and Protocol; the directive for the commencement of negotiations was grounded in the Summit's discretionary mandate as enshrined in Article 3(2) of the Protocol, and it did not contravene Articles 6(d), 7(2) and 8(1)(c) of the Treaty as alleged. We would, therefore, answer this issue in the negative.

Issue No.4: whether the applicants are entitled to orders sought

100. The Applicants seek the following Orders:
    a) A Declaration that the Republic of South Sudan is not a fit and proper country to be granted membership in the East African Community; and
    b) Orders that the Respondents should not grant membership to the Republic of South Sudan in the East African Community.
101. On the other hand, the Respondents oppose the reliefs sought by the Applicants on the grounds that a Declaration that the Republic of South Sudan is unfit for membership of the Community would be tantamount to the Court usurping the role of the Summit.

**Determination on issue No.4**

102. We have carefully considered the submissions of all the Parties on this issue. We find Article 3(2) of the Treaty and Articles 3(3) and 4(6) of the Protocol very pertinent thereto in so far as they address the mandate of the Partner States and Summit with regard to admission of a foreign country to the Community. The prayers sought by the Applicants would appear to require this Court to pronounce itself on a matter explicitly reserved for the above Organs of the Community. In any event, having decided the preceding issue in the negative, the prayers sought by the Applicants are not tenable.

**Conclusion**

103. In conclusion, the Reference is hereby dismissed with costs to the Respondents.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 10 of 2013

**Union Trade Centre Ltd (UTC) And The Attorney General of the Republic of Rwanda**

Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Monica K. Mugenyi, J, & Fakihi A. Jundu, J
November 27, 2014

*Attribution of governmental authority – Codified customary international law- State responsibility for decentralised governance entities- Supplementary rules of interpretation- Whether the acts complained of were those of a Partner State or Institution of the Community.*

*Articles: 5(3), 6(d), 7(1) (a), (2), and 8(1) of the Treaty for the Establishment of the East African Community*
*Rules: 39(1), 41(1), (2) EACJ Court's Rules of Procedure, 2013 - Articles31 (1), 31(4), 32 of the of the Vienna Convention on the Law of Treaties, 1969 - Law No. 10 of 2006 the City of Kigali - Article 11 of Law No. 28 of 2004 Relating to Management of Abandoned Property, Rwanda – Articles 4 and 5 of the International Law Commission Draft Articles on State Responsibility, 2001*

On 20th May 1997, the Applicant was incorporated as a company limited by shares under the Rwanda Companies Act to run and manage the Union Trade Centre (UTC) mall in Kigali, Rwanda. On 2nd October 2013, the Kigali City Abandoned Property Management Commission (Commission) informed tenants in the UTC mall that effective 1st October 2013 they were required to redirect their rental payments to the Commission's Committee in charge of unclaimed property. The Applicant then filed this Reference contending that the Respondent's actions contravened Articles 5(3), 6(d), 7(1)(a) and (2), and 8(1) of the Treaty.

The Respondent contented that: the actions complained of could not be attributed to the Respondent or an institution of the East African Community; that the Respondent was not liable for the actions of the Commission as it had its own legal personality; and that the Applicant had already filed a case against the Commission and this was still pending before a national court of Rwanda.

**Held:**

1) Within the EAC legal regime the Treaty is the primary instrument that outlines the obligations of Partner States in the Community. The International Law Commission Articles, on the other hand, are supplementary rules intended to enable the Court determine the culpability of Partner States for the acts or omissions of their organs. In the present context, the Articles are pertinent to a determination of the Respondent's culpability for the conduct of the Commission and they apply to a dispute brought

against a Partner State by a person resident in the Community.

2) In so far as the Kigali City Abandoned Property Management Commission had been legally authorized to perform a function that was explicitly designated as a function of the State, it was empowered to exercise governmental authority within the precincts of Article 5 of the ILC Articles. Consequently, the Respondent would be responsible for the Commission's acts and alleged misconduct. Thus the present Reference was properly instituted against the Respondent.
3) The Minutes of a meeting of 29th July 2013 sought to be relied upon by the Respondent were annexed to the submissions and do not form part of the Court record and, consequently, they shall not be relied upon by this Court in determining the issue of limitation of time. Accordingly, in the absence of any evidence to the contrary, we are satisfied that the Applicant got to know of the Commissions' assumption of the UTC mall's management on 2nd October 2013 vide a letter to that effect that was duly annexed to the Reference as Annexure G. Since the Reference was filed on 22nd November 2013, it was clearly within the 2-month time frame prescribed by Article 30(2) of the Treaty.
4) The actions in question have not been proven to have contravened Rwanda's internal laws neither does this Court have jurisdiction to determine this issue. Therefore the Court is unable to draw a conclusion that due process was violated or the principles enshrined in Articles 6(d) and 7(2) were breached as the Applicant did not establish Treaty violations attributable to the Respondent.

**Cases cited:**

Attorney General of Kenya v. The Independent Medical Legal Unit EACJ Appeal No. 1 of 2011

Barclay (Guardian ad litem) v. British Columbia 2006 BCCA 434

British Columbia (Minister of Forests) v. Okanagan Indian Band 2003 SCC 71

Captain Harry Gandy v. Caspair Air Charter Ltd (1956) 23 EACA 139

Iran-United States, Claims Tribunal Reports, vol. 21 (1989)

Noble Ventures Inc. v. Romania ICSID Case No. ARB/01/11, 2005

Phillips Petroleum Co. Iran v. Islamic Republic of Iran, Award No. 326-10913-2

Samuel Mukira Muhochi v The Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011 (distinguished)

Sutherland v. Canada (Attorney General) 2008 BCCA 27

## Judgment

**Introduction**

1. This Reference was brought under Articles 5(3), 6(d), 7(1) and (2), 8(1), 27 and 30 of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty), as well as Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as 'the Rules).
2. The Union Trade Centre Limited (UTC), which is hereinafter referred to as 'the Applicant', seeks to hold the Government of the Republic of Rwanda responsible for acts of the Kigali City Abandoned Property Management Commission (hereinafter

referred to as 'the Commission'), an entity that is set up under the internal laws of the Republic of Rwanda. The Government of Rwanda was represented herein by the office of the Attorney General of the Republic of Rwanda (hereinafter referred to as 'the Respondent').

3. At the hearing of this Reference the Applicant was represented by Mr. Francis Gimara while Mr. Aimable Malala appeared for the Respondent.

**4. Applicant's case**

5. On 20th May 1997, the Applicant was incorporated as a company limited by shares under the Rwanda Companies Act to run and manage the Union Trade Centre (UTC) mall in Kigali, Rwanda. On 1st August 2013, the Commission ordered the Applicant to avail it with specific information in respect of the company (UTC), which the latter did on 2nd August 2013. On 2nd October 2013, the Commission informed tenants in the UTC mall that effective 1st October 2013 they were required to redirect their rental payments to the Commission's Committee in charge of unclaimed property. The Applicant thereupon filed this Reference contending that the Respondent's actions contravened Articles 5(3), 6(d), 7(1)(a) and (2), and 8(1) of the Treaty.

**Respondent's case**

6. The Respondent contested the Applicant's allegation and asserted that the acts complained of could not be attributed to a Partner State or an institution of the East African Community (EAC) so as to bring them within this Court's jurisdiction. In addition, the Respondent contended that it was not liable for the acts of the Commission given that the latter had its own legal personality. It was also the Respondent's contention that the filing of the present Reference was an abuse of court process in so far as the Applicant had filed another case against the Commission, namely, Case No. 114/13/TC/NYGE, the determination of which was still pending before a national court in Rwanda. Finally, the Respondent asserted that the Reference was filed out of time having been filed on 22nd November 2013, allegedly well beyond the prescribed time.
7. The Respondent thus raised two preliminary points of law; first, on the jurisdiction of this Court to entertain a Reference premised on actions of an entity that was neither a Partner State nor institution of the EAC, and secondly, on the limitation of time within which a reference may be brought before this Court. The Respondent filed a Notice of Preliminary Objection in that regard as prescribed by Rule 41 of the Court's Rules.

**Scheduling Conference**

8. Pursuant to Rule 53, a Scheduling Conference was held on 12th June 2014 and the parties framed the following issues:
   i. Whether the acts complained of are acts of a Partner State or institution of the Community or whether the Attorney General of Rwanda was properly sued before this Honourable Court.
   ii. Whether the Reference is time-barred and should be struck off the record.
   iii. Whether the action of taking over the Applicant's mall by the Kigali City

Abandoned Property Management Commission is inconsistent with and/ or in contravention of Articles 5, 6, 7 and 8 of the Treaty.

iv. Whether the parties are entitled to the remedies sought.

**Preliminary points of law**

9. Both Counsel argued the points of law posed in the first and second issues above prior to addressing this Court on the substantive Reference. We do adopt the same approach in this judgment given that the points of law raised could dispose of the entire Reference.
   Issue No.1 : Whether the acts complained of are acts of a Partner State or institution of the Community or whether the Attorney General of Rwanda was properly sued before this Honourable Court.
10. It was argued for the Applicant that Rwanda was responsible for the injury the Applicant suffered as a result of the Commission's actions. This argument was premised on the notion that under international law the acts or omissions of an organ of a State are attributable to that State as long as they occurred in an official capacity. In this regard, learned Counsel for the Applicant cited the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter referred to as 'the ILC Articles') as reported in the Yearbook of the International Law Commission, 2001, vol. II (Part Two). Mr. Gimara presented a two-dimensional facet to his contention that the conduct of the Commission was attributable to the State of Rwanda. First, learned Counsel argued that the Commission was an organ of the State of Rwanda within the precincts of Article 4 of the ILC Articles. Secondly, he asserted that the Commission had been empowered by the internal laws of Rwanda to exercise elements of governmental authority and therefore its actions were attributable to Rwanda under Article 5 of the ILC Articles.
11. Conversely, it was argued for the Respondent that the application of the ILC Articles was restricted to inter-State disputes and did not extend to a case initiated by a corporate person, as was the case presently. Learned Counsel for the Respondent did also contend that although the ILC Articles were indeed recognized customary international law, they did not take precedence over the Treaty which, in his view, is codified international law binding upon the EAC Partner States. Further, it was Mr. Malala's argument that the internal law of Rwanda designated the Mayor of Kigali City as the rightful party to disputes such as the present one, rather than the present Respondent. Counsel cited the case of *Modern Holdings Limited vs. Kenya Ports Authority EACJ Reference No. 1 of 2008* in support of his contention that it was only the acts of Partner State that could be litigated before this Court and not those of bodies such as the Commission whose actions are in issue presently.

**Court's determination:**

12. It is common ground herein that the ILC Articles do constitute customary international law. This position was stated in the case of *Noble Ventures Inc. vs. Romania ICSID Case No. ARB/01/11, 2005,* to which this Court was referred by learned Counsel for the Applicant.
13. In that case, a State-owned enterprise was divested to Noble Ventures Inc. by the

Romanian State Ownership Fund (SOF), a public institution with legal personality that was responsible for the implementation of the Romanian Government's privatization program. The privatization agreement between Noble Ventures Inc. and SOF was grounded in an underlying bilateral investment treaty (BIT) between Romania and the United States of America (USA). Six months after the conclusion of the privatization transaction there was a change of Government in Romania, SOF was replaced by the Authority for the Privatisation and Management of the State Ownership (APAPS) and Noble Ventures Inc. encountered a series of operational problems arising from SOF's alleged derogation of its commitments under the privatization agreements. NobleVentures Inc. sought to hold Romania responsible for SOF's conduct, contending that it amounted to breach by Romania of its obligations under the BIT. It was held:

"As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect. Regarding general international law on international responsibility, reference can be made to the Draft Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001. While those Draft Articles are not binding, they are widely regarded as a codification of customary international law."

14. As indicated earlier in this judgment, learned Counsel for the Respondent did raise a question as to the applicability of the ILC Articles to this Court. The foregoing decision underscores the supplementary application of the ILC Articles to formal international treaties such as the EAC Treaty. The interface between the ILC Articles and the Treaty is further clarified in the Commentaries to the Articles, which are similarly reported in the *Yearbook of the International Law Commission (supra).* Our recourse to the ILC Articles'Commentaries is informed by the provisions of Articles 31(1) and (4), and 32 of the Vienna Convention on the Law of Treaties, 1969. The cited provisions are reproduced below:

Article 31

(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) ……..
(3) ……..
(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the application according to article 31:

(a) Leaves the meaning ambiguous or obscure, or

(b) Leads to a result which is manifestly absurd or unreasonable."

15. Over and above the ordinary meaning of terms prescribed by Article 31(1) of the Vienna Convention, Article 31(4) makes provision for special meanings of terms in a treaty if it is established that the special meaning was the intention of the parties thereto. In addition, Article 32 provides for recourse to supplementary means of interpretation, including the preparatory work of a treaty, in order to confirm the ordinary meaning of the terms thereof as prescribed by Article 31(1). In the instant case, although the ILC Articles are not a treaty in the strict legal sense, they are codified customary international law, the interpretation of which would be aptly guided by the principles advanced in Articles 31(4) and 32 of the Vienna Convention. The Commentaries establish the intention of the framers of the ILC Articles and, in so far as they accrue to the draft Articles, would constitute preparatory work to the ILC Articles. They are, therefore, legally recognized supplementary means of interpretation of the said Articles. Indeed, numerous international courts and arbitral tribunals do invariably refer to the Commentaries on the ILC Articles for a determination of State responsibility. See *Phillips Petroleum Co. Iran vs. Islamic Republic of Iran, Award No. 326-10913-2, Iran-United States Claims Tribunal Reports, vol. 21 (1989) and Noble Ventures Inc. vs. Romania (supra)*.
16. Paragraph 1 of the general commentary reported at page 31 of the Commentaries states:
"These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law."
17. Thus where a primary rule exists that places an obligation under international law on a State, in the event that an allegation of non-compliance with such obligation is made against that State a number of other considerations would arise that the Articles seek to address. These considerations include the role of international law as distinct from the internal law of the State in characterizing conduct as unlawful, as well as a determination of the circumstances under which such conduct is attributable to the State as a subject of international law. See *paragraph 3 of the general commentary to the Articles*.
18. In the instant case, the primary 'rules' that place obligations on Partner States would be found in the Treaty, while the ILC Articles would constitute supplementary rules that enable the Court determine whether the action or conduct in alleged contravention of a Treaty provision can be attributed to a Partner State so as to render it responsible for the alleged breach. To that extent, therefore, this Court would in principle be mandated to apply the ILC's Articles to disputes brought before it. The question, however, is the applicability of the Articles to the present dispute which pits a Partner State against a private juridical person.

19. The jurisdiction of this Court is clearly spelt out in Articles 27 and 30(1) of the Treaty. Article 27(1) grants the Court jurisdiction over the interpretation and application of the Treaty. Article 30(1) of the Treaty then prescribes what entities may refer a matter to the Court for determination, the entities against which such matter may be referred and the causes of action that the Court may adjudicate. The Article reads:
"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."
The Treaty thus explicitly mandates natural or juridical persons that are resident in any of the Partner States to refer a dispute to this Court.
20. It is well recognized that conventional international law is derived from international treaties and conventions, and typically demarcated States as the main subjects thereof. Indeed, this was the argument of learned Counsel for the Respondent herein. However, individual persons are increasingly becoming recognized subjects of international law as well in so far as it (international law) imposes certain duties upon States with regard to such persons. Individual persons' recognition as participants in international law is, nonetheless, subject to the existence of specific provision therefor in an international treaty. In the absence of such provision, an individual person cannot bring a complaint; only a State of which s/he is a national would be mandated to complain of a violation before an international tribunal.
21. Applying the foregoing principles to the instant case, we find that the EAC Treaty does make provision for complaints by natural or juridical persons to this Court as outlined in Article 30(1) thereof, and thus recognizes them as subjects of international law in its legal regime. Further, it is quite clear that within the EAC legal regime the Treaty is the primary instrument that outlines the obligations of Partner States in the Community. The ILC Articles, on the other hand, are supplementary rules intended to enable this Court determine the culpability of Partner States for the acts or omissions of their organs. In the present context, the Articles are pertinent to a determination of the Respondent's culpability for the conduct of the Commission. We are satisfied, therefore, that the said Articles do apply to a dispute brought against a Partner State by a person resident in the Community, and do hereby disallow the submission of learned Counsel for the Respondent to the contrary.
22. Having so found, we revert to a consideration of the Respondent's culpability for the Commission's conduct. Learned Counsel for the Applicant relied on Articles 4 and 5 of the ILC Articles for his submission that the Commission's conduct was attributable to the State of Rwanda in so far as it was an organ thereof and/ or had been empowered by the laws of Rwanda to exercise elements of governmental authority. As quite rightly advanced by Mr. Gimara, Article 4(1) of the ILC Articles attributes the conduct of an organ of a State to that State regardless of whether that organ exercises a legislative, executive, judicial or other function. However, Article 4(2) defines an organ, the conduct of which would be attributable to a State, to include 'any person or entity which has that status in accordance with the internal law of the State. That provision thus recognizes the applicability of a State's internal law to a

determination of whether or not a party whose conduct is in issue is, in fact, an organ of the State. Indeed paragraph 6 of the commentary to Article 4 does recognize this in the following terms:

"In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the function of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government."

23. In the same vein in *Noble Ventures Inc. vs. Romania (supra)* it was held:
"Art. 4 2001 ILC Draft (Article 4 of the ILC Articles) lays down the well established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered as an act of that State under international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as d*e jure* organs."
24. In the instant case, Article 2 of Rwanda's *Law No. 10 of 2006 – Determining the Structure, Organisation and the Functioning of the City of Kigali* grants administrative and financial autonomy, as well as legal personality to the City of Kigali. Article 3 of the same law recognizes the division of Kigali City into districts. In turn, Article 6 of the same law grants administrative and financial autonomy, as well as legal personality to each district of Kigali City. On the other hand, this Court's understanding of Article 11 of *Law No. 28 of 2004 – Relating to Management of Abandoned Property* is that it provides for the establishment of Commissions responsible for the management of abandoned property 'at national level, in each province or the City of Kigali and in each district or town or municipality.' The Commission that is under scrutiny presently is the Kigali City Abandoned Property Management Commission that was set up under Article 11 of Law No. 28 of 2004 to undertake the management of abandoned property in Kigali City. No law was presented to us by the Applicant that expressly designates the Commission as an organ of the State of Rwanda as required by Article 4 of the ILC Articles or as was the case in the *Noble Ventures Inc. case (supra)*. Consequently, the Commission cannot be deemed to be a de jure organ of the State of Rwanda neither can its actions be attributed to the said State on that account. We so hold.
25. The question then would be whether the Commission, though not a de jure organ of the State, was nonetheless empowered to exercise elements of governmental authority such as would render the Respondent culpable therefor under Article 5 of the ILC Articles or at all. For ease of reference Article 5 reads:
"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."
26. A review of case law on Article 5 is instructive. In *Noble Ventures Inc. vs. Romania (supra)*, SOF/ APAPS were held to have exercised elements of governmental authority

because the Tribunal found no legal distinction between SOF/ APAPS on the one hand, and a governmental ministry on the other hand, when either entities had been expressly designated by the Romanian Privatisation Law as an empowered public institution for purposes of the country's privatization program. Thus both SOF and APAPS were found to have been clearly charged with representing the Romanian State in the privatization process.

27. In the earlier case of *Phillips Petroleum Co. Iran vs. Islamic Republic of Iran (supra)* the Iran-United States Claims Tribunal had given similar consideration to the express provisions of Iran's internal law in determining whether Iran was responsible for the expropriation of the claimant's goods when it allegedly took the said claimant's property interests through the National Iranian Oil Company (NIOC). The Tribunal observed:

    "International law recognizes that a State may act through organs or entities not part of its formal structure. The conduct of such entities is considered an act of the State when undertaken in the governmental capacity granted to it under the internal law. …. The 1974 Petroleum Law of Iran explicitly vests in NIOC 'the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources."

28. On the other hand, in the more recent case of *Helnan International A/S vs. The Arab Republic of Egypt, Case No. ARB 05/19, 2006* an ICSID (International Centre for Settlement of Investment Disputes) Tribunal considered a challenge by the Respondent to the its jurisdiction on the ground that the actions of the Egyptian Company for Tourism and Hotels (EGOTH), the domestic entity whose acts were in issue in that case, were not attributable to Egypt given that, despite the entity having been within the ownership of the Egyptian Government', its administration allegedly remained independent of the Government. The Tribunal noted that the claimant had convincingly demonstrated that the entity in issue was 'under the close control of the State' in the following aspects:
    a. "The purpose of EGOTH is to 'contribute to the development of national economy in its field of activity and through its subsidiaries companies within the framework of the public policy of the State' (article 2.2 of the internal law);
    b. EGOTH's memorandum and articles of association are reviewed by the State Council (article 11);
    c. EGOTH's general assembly is headed by the Chairman of the Holding Company's board of directors. Moreover, the Minister exercises administrative and executive powers on the Holding Company;
    d. Funds of EGOTH are public funds;
    e. The Manager and Director of EGOTH may be imprisoned if he/ she does not distribute State's shares of profits (Article 49.3)".
29. The Tribunal, nonetheless, held that all the elements of state control demonstrated above were not sufficient to conclude that EGOTH's conduct was attributable to Egypt, and cited with approval the following position by Crawford, J, The International Law Commission's Articles on State Responsibility, 'Introduction, Text and Commentaries', Cambridge University Press, 2002, p.100:

    "The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its

capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5 (of the ILC Articles) refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specific elements of governmental authority."

30. The Tribunal thus negated the structural form of an entity as a basis for determining whether it did, in fact, exercise elements of governmental authority; in preference for the core feature of Article 5, namely, the empowerment of such entity to exercise governmental authority. We do respectfully agree with that conclusion.
31. However, its foregoing findings notwithstanding, the Tribunal then went ahead to deduce EGOTH to have been 'an active operator in the privatization of the tourism industry on behalf of the Egyptian Government' and held:
"Even if EGOTH has not been officially empowered by law to exercise elements of governmental authority, its actions within the privatization process are attributable to the Egyptian State."
32. With the greatest respect, this Court is not persuaded by this specific conclusion. In our judgment, Article 5 of the ILC Articles is couched in very clear and unambiguous terms. Empowerment by law is most clearly a pre-requisite to State responsibility under that Article. Indeed, paragraph 7 of the commentary to Article 5 aptly reinforces this position in the following terms:
"The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. … On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category."
33. The issue of empowerment is a question of fact that must be duly established. In the instant case, the internal laws of Rwanda are pivotal to a determination of whether or not the Kigali City Abandoned Property Management Commission was empowered to exercise a function that would otherwise have been a governmental function.
34. In that regard, Article 3 of Law No. 28 of 2004 explicitly demarcates the management of abandoned property as a function of the State. The Article reads:
"From the day of publication of this law in the official gazette of the Republic of Rwanda, any abandoned property shall be managed by the State until the return of the owners. In case of death of the owner without any legal heir, the property shall devolve to the State."
35. On the other hand, Article 11 of the same law would appear to provide for Commissions to perform that function at national, provincial, city, district, town and municipality level. The Article is reproduced below:

"At the national level, in each Province or City of Kigali and in each District or Town or Municipality, there is hereby established a Commission to manage abandoned property without owners. …."

36. Meanwhile, Article 2 of Law No. 10 of 2006 reads:
"The City of Kigali is one of the administrative entities of the Republic of Rwanda and it is the Capital City of Rwanda. It has its own administration and a legal personality. It is autonomous in administration and finances."
37. It is apparent, therefore, that whereas Article 11 of Law No. 28 of 2004 empowered the Kigali City Abandoned Property Management Commission to administratively serve Kigali City, Article 2 of Law No. 10 of 2006 grants the City distinct legal personality. Two salient issues emerge from the internal laws of Rwanda highlighted above. First, the management of abandoned property is a function of the State that has been devolved to different levels of local government in Rwanda. Secondly, although the Kigali City Abandoned Property Management Commission is not a *de jure* organ of the Rwandan State within the precincts of Article 4 of the ILC Articles, it is an administrative unit of the local government entity known as the City of Kigali. To that extent, the instant case presents a hybrid of Articles 4 and 5 of the ILC Articles whereby the Commission was empowered to exercise governmental authority but was so empowered as an organ of the City of Kigali, a local government unit. It is manifestly clear that in so far as the Kigali City Abandoned Property Management Commission had been legally authorized to perform a function that was explicitly designated as a function of the State, it was empowered to exercise governmental authority within the precincts of Article 5 of the ILC Articles. Consequently, the Respondent would be responsible for the Commission's acts.
38. Having so found, it would follow that the decentralization of the governmental authority in question to provincial, regional and local government units would not negate the Respondent's responsibility for the Commission's conduct. We are fortified in this approach by the recognition that States that operate a decentralized form of governance vary widely in their structure and distribution of powers, and in most cases the constituent local government units have no separate international legal personality of their own. In the instant case, we have carefully scrutinized Law No. 10 of 2006, the objective of which is to determine 'the structure, organization and the functioning of the City of Kigali.' *See Article 1 thereof*. Article 11 of that law details the mandate of the City of Kigali, essentially restricting it to Rwanda's national jurisdiction. There is no indication whatsoever in Law No. 10 of 2006 that the City of Kigali is granted international legal personality. Therefore, we find that the legal personality enjoyed by the City of Kigali under Law No. 10 of 2006 is restricted to Rwanda's internal legal regime.
39. In the result, we are satisfied that the Respondent's responsibility for the alleged misconduct of the Kigali City Abandoned Property Management Commission has been duly established before us. We do, therefore, find that the present Reference was properly instituted against the Respondent. Accordingly, this issue is resolved in the affirmative.

Issue No. 2: Whether the Reference is time-barred and should be struck off the record.

40. The Applicant faults the Commission for wrongfully taking over the management of

UTC mall. This is reflected in paragraph 8 of the Reference. It is, therefore, that act of assuming management for the said mall that, in its view, gives rise to the cause of action before this Court. The Applicant contends that it discovered the alleged 'take-over' on 2nd October 2013 when one of its tenants brought to its attention a letter from the Commission ordering the tenants to pay their rental obligations to it and not the Applicant company. The letter in question was annexed to the Reference as Annexure G.

41. On the other hand, it is the Respondent's case that a decision for the Commission to take over the management of the shares of one Mr. Tribert Rujugiro in UTC was made in a meeting held on 29th July, 2013, therefore it was on that date that the present cause of action arose. The Minutes of the said meeting were not annexed either to the Reference or supporting affidavit, but were presented to this Court alongside the Respondent's written submissions.

**Court's determination:**

42. Article 30(2) of the Treaty provides for the time within which proceedings in this Court may be instituted. The Article reads 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."
43. Rule 39(1) of this Court's Rules of Procedure requires parties to proceedings before the Court to annex to their pleadings all the documentation that they intend to rely on in support of their claims. For ease of reference the Rule is reproduced below:
"There shall be annexed to the original of every pleading certified copies of any relevant document in support of the contentions contained in the pleading."
44. On the other hand, Rule 41 of the same Rules enjoins parties to raise Preliminary Objections by pleading. It reads:
"(1)A party may by pleading raise any preliminary objection.
(2) Where a respondent intends to raise a preliminary objection s/he shall, before the scheduling conference under Rule 53 of these Rules, give not less than seven (7) days' written notice of preliminary objection to the Court and to the other parties of the grounds of that objection."
45. For purposes of Preliminary Objections, therefore, the net effect of Rules 39(1) and 41(1) is that a Preliminary Objection should be pleaded in a Reference and all documentation in support thereof must be annexed to the Reference. In addition, a duty is placed upon a party that intends to raise a Preliminary Objection to serve upon the Court and other parties to the proceedings written Notice of the grounds upon which the Objection is premised. See *Rule 41(2)*.
46. In the instant case, the Minutes that the Respondent now seeks to rely on were neither annexed to the Reference nor to the supporting affidavit. The Respondent could have furnished the said Minutes together with the Notice prescribed in Rule 41(2) but this, too, was not done. In the circumstances, the Respondent's attempt to rely on them at the stage of submissions is, in our considered view, misconceived. It seems quite clear to us that Rule 39(1) is couched in mandatory terms and must be complied with. The

rationale behind that Rule is to avert trial by ambush. Parties must be furnished with sufficient material by way of pleadings to enable them effectively respond to matters in contention between them. This cardinal rule of legal process was well articulated in the case of *Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139* as follows:

"The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent."

47. We therefore find that the Minutes sought to be relied upon by the Respondent do not form part of the Court record and, consequently, shall not be relied upon by this Court in determining the issue of limitation of time. Accordingly, in the absence of any evidence to the contrary, we are satisfied that the Applicant got to know of the Commissions' assumption of the UTC mall's management on 2nd October 2013 vide a letter to that effect that was duly annexed to the Reference as Annexure G. Since the Reference was filed on 22nd November 2013, it was clearly within the 2-month time frame prescribed by Article 30(2) of the Treaty.

We would therefore over-rule the Respondent's Objection on limitation of time, and do answer this issue in the negative.

Issue No. 3: Whether the action of taking over the Applicant's mall by the Kigali City Abandoned Property Management Commission is inconsistent with and/ or in contravention of Articles 5, 6, 7 and 8 of the Treaty.

48. It was submitted for the Applicant that in assuming management of the mall and redirecting rental payments to itself without giving the Applicant the opportunity to be heard, the Commission did not follow due process and thus contravened Article 5(2) of the Treaty that calls for the enhancement and strengthening of partnerships between the Respondent and the Rwandan private sector. The Applicant contended that the arbitrary take-over of the Applicant's property contravened the principles of good governance, rule of law, social justice and equal opportunities as enshrined in Article 6(d) of the Treaty. It was argued for the Applicant that the contravention of the foregoing principles also entailed breach of Articles 7(1)(a) and (2) of the Treaty. Finally, it was the Applicant's contention that the Respondent's arbitrary action defeated its undertakings to foster and promote the objectives of the Community or implementation of the Treaty as prescribed by Article 8(1)(a) and (c) of the Treaty. Learned Counsel for the Applicant cited this Court's definition of the notion of 'rule of law' in the case of *James Katabazi & 21 Others vs. The Attorney General of the Republic of Uganda Reference No. 1 of 2007*, as well as Article 14 of the African Charter on Human and Peoples' Rights and Article 17 of the Universal Declaration on Human Rights in support of his submission that the Respondent's arbitrary actions were a violation of the rule of law and the Applicant's property rights. It was his contention that in so far as the EAC Treaty recognizes the human rights enshrined in the two Conventions, the Respondent's contravention thereof entailed an infringement of the provisions of the Treaty.
49. Conversely, it was the Respondent's submission that the Commission did not take over UTC as a company but only assumed the management of the shares therein

held by Mr. Tribert Rujugiro. It was learned Respondent Counsel's submission that the assumption of the management of the shares was undertaken in accordance with Rwanda's Law No. 28 of 2004 and therefore was not a violation of the principles of the Treaty. Learned Counsel countered the Applicant's allegation of arbitrariness in the manner in which the Respondent's actions accrued, with the assertion that the Commission's action was undertaken with the knowledge of the Applicant as demonstrated by the Minutes of a meeting held on 29th July 2013. Finally, Counsel drew a distinction between the facts of *James Katabazi & 21 Others vs. The Attorney General of the Republic of Uganda (supra)* and the present case to the extent that no court order had been violated by the Respondent herein.

**50. Court's determination:**

We have carefully considered the pleadings, evidence and supporting documentation of both parties. The crux of the matter herein is whether the Commission's acts contravene Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1) of the Treaty. For ease of reference the cited Articles are reproduced below.

Article 5(3)(g)

For purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the Community shall ensure:

(g) the enhancing and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development.

Article 6(d)

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

(2) 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.

Article 7(1)(a) and (2)

(1) The principles that shall govern the practical achievement of the objectives of the Community shall include:
   (a) people-centred and market-driven cooperation.

(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.

Article 8(1)

The Partner States shall:

(a) Plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the Treaty.

(b) Co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community, and

(c) Abstain from any measures likely to jeopardize the achievement of those

objectives or the implementation of the provisions of this Treaty.

51. We must reiterate from the onset our earlier finding that the Minutes of the meeting of 29th July 2013 are not on record and therefore cannot be relied upon by this Court. However, even if we were to make reference to them, they do relate to a decision to manage an individual shareholder's equity in the UTC mall rather than the assumption of the mall. Clearly there is contention between the Parties as to whether the Commission took over management of the UTC mall or simply assumed management of a shareholder's 'abandoned' equity therein.
52. Be that as it may, in the present Reference this Court is faced with the question as to whether actions allegedly undertaken in accordance with the internal law of a Partner State contravene the provisions of the Treaty. Rwandan internal law does provide for the management of abandoned property by the Commission. Whether, in fact, the Commission's actions were undertaken in compliance with Rwanda's internal laws is another matter. The material before this Court raises fundamental questions as to whether the 'property' in respect of which the Commission had assumed management had actually been abandoned so as to evoke the provisions of Law No. 28 of 2004, and whether the Applicant was given an opportunity to be heard prior to being deprived of the mall's management or, indeed, rental proceeds therefrom. The determination of those questions is critical to the ascertainment by this Court of the Respondent's compliance with Articles 6(d) and 7(2) of the Treaty. It seems to us that were those questions to be answered in the affirmative then there would be no breach by the Respondent of Articles 6(d) and 7(2) of the Treaty because due process that is inherent in the principles of good governance, rule of law and social justice enshrined in these Articles would have been followed.
53. Perhaps more importantly, then, is the jurisdiction of this Court with regard to a domestic entity's compliance with the internal laws of Partner States or the lack thereof. Stated differently, this raises the question as to whether this Court can inquire into a domestic entity's compliance with the internal laws of a Partner State (or the lack of it). It is now well settled law that this Court's jurisdiction is restricted to the interpretation of Treaty provisions. See Article 27(1) of the Treaty, *Attorney General of Kenya vs. The Independent Medical Legal Unit EACJ Appeal No. 1 of 2011* and *Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011*. Conversely, the proviso to Article 27 does recognize the jurisdiction of organs of the Partner States.
54. That is not to say that this Court cannot intervene where it has been established before it that a Partner State has acted in breach of its own internal laws. On the contrary, this Court has held that such a Partner State would be in contravention of Articles 6(d) and 7(2) of the Treaty to the extent that it has violated the principles of good governance and rule of law. Indeed in the case of *Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda (supra)* this Court did rule that to the extent that section 3(1) of Uganda's East African Community Act, 2002 domesticated and adopted the Treaty into the laws of Uganda, a breach of Treaty provisions would amount to a breach of the internal laws of Uganda. It was the Court's finding that in declaring the Applicant therein a prohibited immigrant, Uganda had failed to follow its immigration laws and thus breached Articles 6(d) and 7(2) of the Treaty.

However, the circumstances pertaining to the present Reference are distinctly different from those in the *Samuel Mukira Muhochi case*. In that case the Applicants therein challenged the provisions of the law under which the acts complained of had ensued. That is not the case presently; Law No.28 of 2004 is not in issue before us.

55. This Court is enjoined to restrict itself to the jurisdiction conferred upon it under Article 27(1) and acknowledge the jurisdiction of national courts as delineated in the proviso to Article 27(1). The restriction of this Court's jurisdiction to the interpretation of the Treaty would defer legal disputes that fall outside that ambit to the jurisdiction of national courts or other related bodies. Accordingly, we find that the question as to whether or not the Respondent's actions were in compliance with Rwanda's internal laws is not a matter of Treaty interpretation and is therefore not an issue for determination by this Court.
56. On the other hand, the Applicant faults the Commission for engaging in acts contrary to Articles 5(3)(g) and 8(1)(a) and (c) of the Treaty. A plain reading of those Treaty provisions reveals that they highlight parameters that are intended to facilitate the crystallization of the Community's objectives as outlined in Article 5(1) of the Treaty, as well as the implementation of the Treaty. The Applicant faults the Commission for engaging in acts contrary to those parameters. With respect, we are unable to agree with the Applicant. We find that Articles 5(3)(g) and 8(1)(a) pertain to Rwandan national policy which is not in issue before this court. What is in issue here is the conduct of the Commission.
57. Unlike Articles 5(3)(g) and 8(1)(a), however, Article 8(1)(c) pertains to any 'measures' undertaken by Partner States which are likely to jeopardize the realization of the objectives of the Community or implementation of the Treaty. This would extend beyond policies to include the Commission's actions that are presently under scrutiny and, indeed, the law on abandoned property itself. However, first, we have already found that the actions in question have not been proven to have contravened Rwanda's internal laws neither does this Court have jurisdiction to determine that issue. Therefore, we are unable to draw a conclusion that due process has been violated or the principles enshrined in Articles 6(d) and 7(2) have been breached. Secondly, although Law No. 28 of 2004 under which the acts complained of were undertaken may be deemed to be a 'measure' for purposes of Article 8(1)(c) and would therefore be open to scrutiny by this Court, that law was never in issue in the present Reference. At the risk of repeating ourselves, only the Commission's actions as implemented thereunder were in issue herein.
58. In the result, we find that the Applicant has not established a Treaty violation attributable to the Respondent. We so hold.

    Issue No. 4: Whether the parties are entitled to the remedies sought.
59. The Applicant sought the following prayers and orders against the Respondent :
    a. A declaration that the actions of the Respondent in taking over the Applicant's property contravened Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty ;
    b. An Order that the Respondent be restrained from further interference with the business and management of the Applicant's property ;
    c. An Order that the Respondent pays general damages to the Applicant and costs

of and incidental to this Reference be met by the Respondent.

d. That this Court be pleased to make such further or other Orders as may be just and necessary in the circumstances.

60. Having found that the Applicant has not established a violation of the Treaty that is attributable to the Respondent, we decline to grant the Declaration sought in paragraph (a) above. Accordingly, the Applicant is not entitled to the restraining Order sought under paragraph (b) or to general damages as claimed under paragraph (c) above. We do, therefore, decline to grant the said Orders.
61. With regard to the prayer in paragraph ( c), it is a well established rule of procedure that costs should follow the event. However, we are also mindful of exceptions to this rule in exceptional circumstances. Hence in *Sutherland vs. Canada (Attorney General) 2008 BCCA 27 (CanLii)* the Supreme Court of British Columbia held that courts should not depart from this rule except in special circumstances, as a successful litigant has a 'reasonable expectation' of obtaining an order for costs.
62. In *Barclay (Guardian ad litem) vs. British Columbia 2006 BCCA 434 (CanLii)* matters of public interest were identified as exceptions to the general rule. It was held (per Mackenzie JA):
"The strictures of the general rules in private litigation are modified to some degree in litigation which engages a broader public interest beyond the pecuniary interests of the particular plaintiffs who pursue the action."
63. Similarly, in *British Columbia (Minister of Forests) v. Okanagan Indian Band 2003* SCC 71 (CanLii) Lebel J. stated:
"In highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequences of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party."
64. In the instant case, the Reference largely gravitated around issues of State responsibility for the conduct of decentralised or devolved governance entities. Those issues are of great importance to the Community and Partner States, and have not previously been adjudicated before this Court.

**Conclusion**

65. In the final result, we do hereby dismiss the Reference and order each Party to bear its own costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No.11 of 2013

**Simon Peter Ochieng and John Tusiime And The Attorney General of the Republic Uganda**

Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ, & Fakihi A. Jundu, J
August 7, 2015

*Departure from pleadings – Delayed judicial appointments in Uganda - The Principle of legality- exercise of governmental authority - Rule of law and good governance- Whether the President of the Republic of Uganda's inaction to appoint judges breached the Treaty.*

*Articles: 6(d), 7(2), 27(1) and 30(1) of the EAC Treaty - Rules 24 (1), (2)(3), 37(1), 40(1) of the East African Court of Justice Rules of Procedure, 2013- Articles: 28, 50(1), 138(1) of the Constitution of Uganda*

The Applicants, residents of Uganda averred that the refusal by the President of Uganda to fill the positions of judges in the Supreme Court, Court of Appeal and High Court of Uganda was unconstitutional, illegal and breached the Treaty. This affected the efficacy of the Judiciary through lack of coram, extra work overload on available judges, delayed adjudication of cases and abuse of the relief of bail so as to avert lengthy periods of remand for suspected criminals. They sought declarations *inter alia* that this violated the right to a fair hearing guaranteed in Article 28 of the Constitution of Uganda and breached the principles of good governance, rule of law in Articles 6(d) and 7(2) of Treaty.

The Applicant averred that the Parliament of Uganda had passed a Resolution increasing the designated number of High Court judges to 82 and that the Judicial Service Commission should have complied with the said Resolution and recommended to the President for appointment, the number of judges as had been approved by Parliament.

The Respondent contested the Applicants case stating that the judges had been increased with six judges appointed to the Supreme Court, nine judges to the Court of Appeal and seventeen to the High Court and four additional High Court judges were awaiting Parliamentary approval. And that, while a recommendation had indeed been made for the increase of the number of High Court judges from 50 to 82, Parliament had not made a resolution to give effect to that recommendation The Respondent also averred that the Reference was speculative and should be struck out.

**Held:** The President's in-action complained of raised questions of legality, rule of law and good governance and infringement of Treaty provisions by the Respondent, as well as matters of Treaty interpretation.

The Applicants' attempt to depart from the contents of their Reference by introducing omissions by the Judicial Service Commission was untenable and was disallowed. The court was satisfied that there was no refusal by the President of the Republic of Uganda to appoint the number of judges purportedly approved by Parliament.

**Cases cited:**
Captain Harry Gandy v. Caspair Air Charter Ltd (1956) 23 EACA 139
Union Trade Centre (UTC) v. Attorney General of the Republic of Rwanda EACJ Ref. No. 10 of 2013

**Judgment**

**Introduction**

1. This Reference was brought under Articles 6(d), 7(2), 27(1) and 30(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty), as well as Rules 24 (1), (2) and (3) of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as 'the Rules').
2. It is premised on the Applicants' contention that the refusal by the President of the Republic of Uganda to appoint judges to Uganda's Supreme Court, Court of Appeal and High Court contravenes Articles 6(d) and 7(2) of the Treaty in so far as it amounts to interference with the independence of the Judiciary; violates the right to a fair hearing as guaranteed by Article 28 of the Ugandan Constitution, which includes a right to a speedy trial; violates the fundamental rights and freedoms guaranteed by the Ugandan Constitution because the said rights and freedoms cannot be protected by the courts, and stifles the Judiciary's execution of its constitutional mandate under Article 50(1) of the Ugandan Constitution.
3. At the hearing of the Reference, the Applicants were represented by Mr. Ladislaus Rwakafuuzi while Ms. Christine Kaahwa, Mr. Jimmy Oburu Odi and Ms. Clare Kukunda appeared for the Respondent.

**Applicants' Case**

4. The gist of the Reference is that the number of judges in the Supreme Court, Court of Appeal and High Court of Uganda is established by law; the refusal by the President of Uganda to fill the positions available in the respective courts is unconstitutional, illegal and a breach of Articles 6(d) and 7(2) of the Treaty, and the said refusal has suffocated the efficacy of the Judiciary through lack of coram, work overload on available judges, delayed adjudication of cases and abuse of the relief of bail so as to avert lengthy period of remand for suspected criminals.
5. The Applicants sought the following Declarations:-
    i. That the refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as demanded by law is a breach of the Treaty in Articles 6(d) and 7(2) that enjoin Partner States to adhere to the rule of law and good governance;
    ii. That the refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as required by

law is an interference with the independence of the Judiciary, which interference is a breach of the Treaty in Articles 6(d) and 7(2) that enjoin Partner States to adhere to the rule of law and good governance;

iii. That the refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as provided by law violates the right to a fair hearing guaranteed in Article 28 of the Constitution of Uganda and thereby breaches the Treaty in Articles 6(d) and 7(2) that enjoin Partner States to adhere to the principles of good governance, rule of law and the maintenance of universally accepted standards of human rights;

iv. The refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court of Uganda as required by law violates the fundamental rights and freedoms guaranteed by the Constitution of Uganda and this is contrary to Articles 6(d) and 7(2) of the Treaty which enjoins all Partner States to protect human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; and

v. The refusal by the President of Uganda to appoint Justices of the Supreme Court and Court of Appeal, and judges of the High Court as demanded by law stifles the capacity of the Judiciary to exercise its jurisdiction under Article 50(1) of the Constitution, for the protection of fundamental rights and freedoms, because of lack of the required manpower resources as required by Objective V of the Constitution of Uganda and thereby breaches Article 6(d) and 7(2) of the Treaty.

**Respondent's Case**

6. The Respondent contested the alleged refusal by the President of the Republic of Uganda to appoint judges or the purported interference with the independence of the Judiciary, as asserted by the Applicant. On the contrary, it was the Respondent's contention that the President had effected the appointments of six (6) judges of the Supreme Court, four (4) of whom were appointed in acting capacity; nine (9) judges of the Court of Appeal, as well as 17 judges of the High Court, and the appointment of 4 additional High Court judges awaited Parliamentary approval. The Respondent argued that the foregoing appointments had enhanced the independence of the Judiciary to effectively perform its dual constitutional role of administration of justice and ensuring the rule of law. In addition, the Respondent contended that whereas the appointment of the Chief Justice could not be concluded before the determination of *Gerald Kafureka Karuhanga vs. Attorney General Const. Petition No. 39 oF 2013*, which had challenged the process thereof, the process of appointing a Deputy Chief Justice, as well as a judge to replace a deceased judge of the Court of Appeal (Justice Amos Twinomujuni) had commenced. The Respondent did also contend that there was no Parliamentary Resolution increasing the number of judges of the High Court from 50 to 82, as had been alleged; rather, the High Court was presently fully constituted with 52 judges.

7. Finally, the Respondent raised a point of law in respect of the Applicants' pleadings, asserting that they were vague, argumentative, scandalous and speculative in nature, and should be struck out. However, the Respondent did not file a Notice of Preliminary Objection in that regard as prescribed by Rule 41 of the Court's Rules.

It is therefore presumed that the point of law raised was not intended to be raised as a preliminary objection. In fact, as it transpired, this issue was not canvassed in the Respondent's submissions at all.

**Scheduling Conference**

8. Pursuant to Rule 53 of the Court's Rules, a Scheduling Conference was held on 9th September 2014 and the
   Parties framed the following issues for determination:-
   i) Whether the Reference raised a matter for interpretation by this Court pursuant to Article 30 of the Treaty;
   ii) Whether the Parliament of Uganda has ever resolved to increase the number of High Court Judges to 82 and, if so, whether the President of the Republic of Uganda refused to appoint judges of the High Court as prescribed by Parliament and recommended by the Judicial Service Commission;
   iii) Whether the President of the Republic of Uganda has declined to appoint judges of the Court of Appeal and Supreme Court as prescribed by the Laws of Uganda; and
   iv) Whether the alleged refusal of the President to appoint judges is a breach of Articles 6(d) and 7(2) of the Treaty.
   Issue No.1: whether the Reference raised a matter for interpretation by this court pursuant to Article 30 of the Treaty

**Applicants' Submissions**

9. It was the Applicants' contention that in so far as they sought a Court Declaration that a Partner State was acting in violation of the Treaty by refusing to appoint judges as by law required, the Reference did disclose a cause of action and was properly before this Court. The Applicants relied on this Court's decision in the case of *Hon. Sitenda Sebalu vs. The Secretary General, East African Community & Others EACJ Ref. No. 1 of 2010* as reproduced below:-
   "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."
10. The Applicants argued that in so far as they had alleged the violation of Articles 6(d) and 7(2) of the Treaty by the Respondent's actions above, the Reference did disclose a cause of action that was justiciable by this Court.

**Respondent's Submissions**

11. It was argued for the Respondent that whereas Article 30 of the Treaty did cloth this

Court with jurisdiction on Treaty interpretation, the Applicants' allegation that the refusal by a Partner State to appoint judges as by law prescribed violated Articles 6(d) and 7(2) of the Treaty could not be sustained as the Respondent had complied with the legal regime for appointment of judges in Uganda.

12. This Court was referred to the case of *Gerald Kafureka Karuhanga vs. Attorney General (supra)* that delineated the appointment of judges as a tripartite process involving the President, the Parliament of Uganda and the Judicial Service Commission; as well as the affidavit evidence of the Secretary to the Judicial Service Commission, one Kagole E. Kivumbi, and the Secretary to Judiciary, one Dorcas Okalany, in support of the preposition that the Respondent had duly complied with all the legal provisions pertaining to appointment of judges. We were also referred to this Court's decision in Henry Kyarimpa vs. Attorney General of Uganda EACJ Ref. No. 4 of 2013 where it was held that where a Partner State acted in accordance with its national legal framework, this Court would not make a finding of Treaty violation.

**Court's Determination**

13. Articles 27(1) and 30(1) of the Treaty do explicitly confer upon this Court the jurisdiction for the interpretation and application of the Treaty. We reproduce the said Articles for ease of reference:-

    Article 27(1)

    "The Court shall have jurisdiction over the interpretation and application of this Treaty."

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

14. Therefore, for a matter to be justiciable before this Court the subject matter in question must be an Act or statute, or a regulation, directive, decision or action. Further, it must be one, the legality of which is in issue viz the national laws of a Partner State, or one that constitutes an infringement of any provision of the Treaty.
15. In the present case, the Reference raises issues of due process in the appointment of judges and the implication of in-action in that respect to the effective administration of justice and, indeed, the function of the Judiciary in the national governance structure. The subject matter that gives rise to a cause of action herein would be the inaction by the President with regard to the appointment of judges despite the recommendations of the Judicial Service Commission. Stated differently, the matter in issue presently is the 'decision' by the President not to act on the recommendations of the Judicial Service Commission. It is this decision that is construed by the Applicants as a refusal to effect judicial appointments as recommended.
16. Further, the Reference raises questions to do with the President's compliance with the legal regime of Uganda, on the one hand; as well as whether or not his decision as described above is in compliance with the principles outlined in Articles 6(d) and 7(2) of the Treaty.

17. The provisions that are alleged to have been contravened by the Respondent's purported refusal to appoint judges to the respective Ugandan Courts are Articles 6(d) and 7(2) of the Treaty. They provide as follows:-
    Article 6(d)
    "The fundamental principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:-
    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."
    Article 7(2)
    "The Partner States shall 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."
18. The in-action complained of by the Applicants herein does raise connotations of legality with regard to Uganda's legal regime, as well as good governance and rule of law as stipulated in Articles 6(d) and 7(2) hereof. This would be a justiciable matter within the precincts of Articles 27(1) and 30(1) of the Treaty in so far as it entails a decision not to act immediately upon the recommendations of the Judicial Service Commission. It necessitates a determination of the legal regime on the appointment of judges in Uganda and whether it has been complied with by the President of the Republic of Uganda; as well as an interpretation of the principles rule of law and good governance, and a determination as to whether or not the course of action adopted by the President is in compliance with those principles of the Treaty.
19. Quite clearly, the Respondent's contention that there was compliance with the legal regime for the appointment of judges in Uganda and therefore the Reference did not raise a matter for Treaty interpretation is a question of fact that must be established. Indeed, that is the gist of the residual issues in this Reference, to which we shall revert shortly.
20. In the result, we are satisfied that the Reference does raise complaints of illegality and infringement of Treaty provisions by the Respondent, as well as matters for interpretation by this Court. We do, therefore, resolve Issue No. 1 in the affirmative.
    Issue no. 2: whether the Parliament of Uganda has ever resolved to increase the number of High Court Judges to 82 and, if so, whether the president of the Republic of Uganda refused to appoint judges of the High Court as prescribed by Parliament and recommended by the Judicial Service Commission

**Applicants' Submissions**

21. As quite rightly submitted by the Applicants, there are 2 aspects to this issue; first, the question of whether or not the designated number of High Court judges had indeed been increased to 82 and, secondly, whether the President had refused to act in compliance with that designation to appoint the said number of High Court judges.
22. It was argued for the Applicants that, acting within Article 138(1) of the Constitution of Uganda, the Parliament of Uganda had passed a Resolution that increased the

designated number of High Court judges to 82. A recommendation to that effect as stated in the Report of the Legal and Parliamentary Affairs Committee on the Ministerial Policy Statement for the Financial Year 2009/10 (Annexure D) was availed to this Court. The recommendation reads:

"The Committee adopts the recommendation of the Judiciary that Supreme Court judges should be increased from 7 to 11, Court of Appeal from 8 to 15 and High Court from 50 to 82."

23. On the other hand, the Legal and Parliamentary Affairs Committee Report in which the said recommendation was made (Annexure D) outlined the mandate of the said Committee as follows:-
    - "Discuss and review the estimates of the revenue and expenditure;
    - Examine and comment on policy matters ; and
    - Evaluate the previous financial performance of institutions listed in the scope below, and make recommendations to Parliament."
24. On the second leg of this issue, it was conceded by the Applicants that the Judicial Service Commission should have complied with the said Resolution and recommended to the President for appointment, the number of judges as had been approved by Parliament; but it did not make the requisite recommendation therefore the President did not refuse to appoint judges as recommended by the said Commission. Nonetheless, the Applicants' sought to hold the Respondent responsible for the Commission's omission on the premise that it was part of the Executive arm of Government and therefore this Court should find that the Respondent had arbitrarily refused to appoint judges of the High Court as allegedly resolved by Parliament.

**Respondents' Submissions**

25. In turn, it was the Respondent's contention that whereas a recommendation had indeed been made for the number of High Court judges to be increased from 50 to 82, Parliament had not made a resolution to give effect to that recommendation. The Respondent relied on the affidavit evidence of Mr. Kivumbi, Ms. Okalany and one Paul G. Wabwire, the Deputy Clerk to Parliament in charge of Parliamentary Affairs, in support of this position.
26. Paragraph 9 of Mr. Kivumbi's affidavit dated 10th May 2014 reads:-
    "That I know that there is no resolution of Parliament varying the number of High Court judges from 50 to 82, and the current establishment of judges of the High Court is 52 and the High Court is fully constituted."
27. In the same vein, paragraphs 4 – 6 of Mr. Wabwire's affidavit dated 3rd December, 2014 read as follows:-
    4. That I know that the Sectoral Committee on Legal and Parliamentary Affairs of the Parliament of Uganda did adopt recommendations of the Judiciary in the Ministerial Policy Statement of the financial year 2009/2010 of the Ministry of Justice and Constitutional Affairs to increase the number of High Court judges from 50 to 82. (Attached hereto is a copy of the Committee's Report marked Annexure "B").
    5. That I know the said recommendations were presented to the Whole House of Parliament of Uganda by the Committee mentioned in paragraph 4 above and

the House adopted the said recommendations on the 4th day of September 2009. (Attached hereto is a copy of the Hansard marked as Annexure "C").

6. That after the adoption of the recommendation by the Whole House of Parliament it is incumbent upon the responsible government department in this case the Attorney General to present a motion for the resolution of Parliament to effect the recommendations as in this case to increase the number of judges of the High Court.

28. Finally, paragraphs 6 and 7 of Ms. Okalany's affidavit of 21st November, 2014 read:-

6. That I know that the adoption of the said recommendations by Parliament has not yet crystallized into a resolution of Parliament to increase the number of High Court judges from 50 to 82.
7. That for the adopted recommendation to crystallize into a resolution of Parliament, the Ministry of Finance, Planning and Economic Development has to first issue a certificate of financial implication to indicate that funds will be available to facilitate the recruitment of judges.

**Court's Determination**

29. We have carefully considered the documentation before us in respect of the alleged decision of Parliament to increase the Uganda High Court judges from 50 to 82 in number. It seems quite clear to us that the decision in Annexure D to the Reference that the Applicants sought to rely upon was a Recommendation not a Resolution of Parliament. With regard to the Recommendation of the Whole House of Parliament, whereas Mr. Wabwire did depone to the House having adopted the recommendation of the Committee on Legal and Parliamentary Affairs, this is not borne out by Annexure C to his affidavit. That document is an incomplete copy of the Hansard of 4th September 2009 that omits the actual adoption of the Committee's Report.
30. Be that as it may, in paragraph 6 of his affidavit, Mr. Wabwire explicitly explains how Resolutions of Parliament are generated. In paragraph 3 of his affidavit, the same Deponent attaches a Resolution of Parliament dated 18th September, 2003 in respect of the increment of the number of High Court judges from 30 to 49. This document is akin to a similar Resolution availed to this Court by the Applicants as Annexure C to the Reference. Clearly, the documentation in proof of the Committee's Recommendations for the increment of the number of High Court judges from 50 to 82 is a far cry from the certified, formal and binding Resolution of Parliament that underscored the increase in the number of High Court judges in 2003.
31. It was erroneous and misleading, therefore, for learned Counsel for the Applicants to refer to the Committee's recommendation as a Resolution of Parliament. In the absence of a formal Resolution to that effect, the Applicants fell short on proof of their allegations with regard to the number of High Court judges. Consequently, we find no Resolution on record for the increment of the number of judges of the High Court to 82. What is on record is a recommendation of the Committee on Legal and Parliamentary Affairs that was adopted by the Whole House.
32. With regard to the second leg to this issue, we have carefully scrutinized the Reference herein and find no averment whatsoever in respect of the purported omission by the Judicial Service Commission to recommend to the President for appointment

such number of High Court judges as had been recommended by Parliament. That position was never raised in the Applicants' pleadings and therefore was not in issue herein.

33. Rule 37(1) of this Court's Rules provides:-
"Subject to the provisions of this Rule and Rules 40, 41 and 42, every pleading shall contain a concise statement of material facts upon which the party's claim or defence is based …."
34. Rule 40(1) of the same Rules provides:-
"No party may, in any pleading, make an allegation of fact, or raise any new ground of claim inconsistent with that party's previous pleading in the same case."
35. The term 'pleading' is defined in Rule 2 of the said Rules to include 'any document lodged by or on behalf of a party relating to a matter before the Court.'
36. It seems quite clear that Rule 37(1) places an obligation upon all Parties to matters before this Court to explicitly and concisely state the material facts upon which their claim or defence is premised. It is couched in mandatory terms and must, therefore, be complied with. In the case of *Union Trade Centre (UTC) vs. Attorney General of the Republic of Rwanda EACJ Ref. No. 10 of 2013*, this Court did have occasion to address a similar issue as follows:-
"The rationale behind that Rule is to avert trial by ambush. Parties must be furnished with sufficient material by way of pleadings to enable them effectively respond to matters in contention between them. This cardinal rule of legal process was well articulated in the case of *Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139* as follows:
'The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent.'"
37. In any event, Rule 40(1) expressly prohibits Parties' departure from their pleadings. In our considered view, the definition of pleadings as stated above does include Written Submissions as lodged in Court on behalf of Parties. Throughout the Reference it was the alleged inactions of the President of the Republic of Uganda that were in issue. Therefore, the Applicants' attempt to depart from the contents of their Reference by introducing omissions by the Judicial Service Commission is untenable and is hereby disallowed. Consequently, as conceded by the Applicants, we are satisfied that there was no refusal by the President of the Republic of Uganda to appoint the number of judges purportedly approved by Parliament. In the result, we do hereby answer both legs of Issue No. 2 in the negative.
Issue No.3: whether the president of the Republic of Uganda has declined to appoint judges of the Court of Appeal and Supreme Court as prescribed by the laws of Uganda
Issue no.4: whether the alleged refusal of the president to appoint judges is a breach of Articles 6(d) and 7(2) of the Treaty
38. It was the finding of this Court under Issue No. 2 above that the President of the Republic of Uganda did not refuse to appoint judges of the High Court as contended by the Applicants. Therefore, the only refusal that is in issue in Issue No. 4 would be the alleged refusal by the President to appoint judges of the Supreme Court and

Court of Appeal. This is the thrust of Issue No. 3 hereof. We do, therefore, deem it prudent to address Issues 3 and 4 together.

**Applicants' Submissions**

39. It was the Applicants' case that the Judicature Act of Uganda (as amended) prescribes the number of judges of the Supreme Court and Court of Appeal as 11 and 15 judges respectively. This fact is not in dispute, having been conceded by both Parties at the Scheduling Conference. On the basis of a letter from the Secretary to the Judicial Service Commission, Mr. Kagole Kivumbi, dated 12th November, 2013 and appended to the Reference as Annexure B; it was argued for the Applicants that given the President's refusal to appoint the legally prescribed number of judges as recommended by the Judicial Service Commission, the Government of Uganda (by implication, the Respondent) exercised a discretion that was not available to it and, therefore, acted illegally, arbitrarily and in contravention of Articles 6(d) and 7(2) of the Treaty.
40. In support of his argument that the exercise of legitimate authority must be done in accordance with the law, short of which it amounts to a breach of the Treaty; learned Counsel for the Applicants cited the following text from Halsbury's Laws of England, 4th Edition, Vol. 1:
"The principle of legality. The exercise of governmental authority directly affecting individual interests must rest on legitimate foundations."
41. Mr. Rwakafuuzi did also rely on the case of *FIDA Kenya & 5 Others vs. Attorney General of Kenya & Others Petition 102 of 2011* in support of his argument that judicial appointments must be made in accordance with the law, and the law in Uganda as interpreted by the Constitutional Court in the case of *Gerald Kafureka Karuhanga vs Attorney General (supra)* was that when making judicial appointments the President of Uganda was legally bound to act within the recommendations of the Judicial Service Commission. Learned Counsel did also make mention of the case of *Muslim for Human Rights (MUHURI) & 2 Others vs. Attorney General of Kenya Petition No. 7 of 2011* where it was reportedly held that there cannot be a vacuum for the seats of Chief Justice and Deputy Chief Justice. This authority was not availed to the Court.
42. On the other hand, questions from the Bench on this issue canvassed the following areas: why the Applicants did not verify with the Office of the President its receipt of the recommendations of the Judicial Service Commission as it had done with the latter entity; when silence from the President becomes refusal; when would a breach occur when an appointment process is ongoing, as well as what, in his view, was the import of the certificate of financial implication that had been appended to the affidavit of Ms. Okalany.
43. In response to the foregoing questions, Mr. Rwakafuuzi argued that silence for a reasonable time was acceptable but when it went beyond 3 months it became tantamount to a refusal to act. On the issue of confirmation of receipt of the recommended names by the Office of the President, learned Counsel argued that whereas the said office received recommendations from numerous offices, the Judicial Service Commission was the most competent body to advise on recommendations on judicial appointments; and, in any event, the Respondent herein had not rebutted the

fact of the recommendations. Similarly, on the question of the financial implications of judicial appointments, Mr. Rwakafuuzi argued that the President had not indicated that his silence on the matter was owing to lack of finances; rather, the judges that were eventually appointed as Chief Justice and Deputy Chief Justice had been in the Judiciary all along. In any event, Mr. Rwakafuuzi contended that by the time the Cabinet approved the increment of the number of Supreme Court and Court of Appeal judges as prescribed in the Judicature Act (as amended), it would have considered the financial implications of such judicial appointments. Without citing a specific constitutional provision, learned Counsel argued that it was only such laws as were brought under a Private Members' Bill that would require a certificate of financial implications. Finally, we understood Mr. Rwakafuuzi to argue that even where a process was on-going the time frame within which it was concluded should be reasonable.

**Respondent's Submissions**

44. It was the Respondent's contention that the Reference fell short on proof that recommendations for judicial appointments had been sent to the President and he had refused to effect the said appointments. It was argued for the Respondent that the recruitment of judges was on-going and it was expected to be complete by June 2015, but was subject to budgetary constraints; therefore the President could not be said to have refused to effect judicial appointments. Citing the case of *Katabaazi & 21 Others vs. Secretary General of EAC & Another EACJ Ref. No. 1 of 2007*, learned Counsel for the Respondent contended that the notion of 'rule of law' entailed compliance with the governing legal framework of a given Partner State. Ms. Kaahwa argued that no evidence had been adduced by the Applicants to show that there had been a departure from the prevailing legal framework in Uganda on appointment of Judges.
45. At the onset of oral highlights in this matter, learned Counsel for the Respondent produced a letter from the Judicial Service Commission that was, with consent from opposite Counsel, admitted on the Court record. The said letter relayed the (then) current status of judicial appointments in Uganda to wit the Chief Justice and Deputy Chief Justice had since been appointed, and the process for the appointment of four (4) judges of the Supreme Court, seven (7) judges of the Court of Appeal and sixteen (16) judges of the High Court was still ongoing following the conclusion of interview of prospective appointees in November and December 2014, and March 2015 respectively.
46. Ms. Kaahwa argued that, contrary to the Applicants' assertion, there had been no refusal by the President to appoint judges but, rather, the appointment process involved different entities; starting with the recommendation of appointees by the Judicial Service Commission, and consideration and consultations by the President in respect thereof. It was Ms. Kaahwa's contention that non-appointment of the names as submitted does not amount to a refusal on the part of the President. She argued that, owing to budgetary constraints, the appointment of judges had been effected in a phased manner. Ms. Kaahwa cited this Court's decision in *Katabaazi & 21 Others vs. Secretary General of EAC & Another (supra)* where it was held that it

was not the role of the Court to superintend the Republic of Uganda in its Executive or other functions.

47. In a nutshell, it was the case for the Respondent that there had been no breach of the Treaty; judicial appointments were an ongoing process to which the Government of Uganda was committed; there were no time limits within which the process should be concluded, and it was not true that it was only Private Members' Bills that required certificates of no objection. However, in response to questions from the Bench, learned Counsel for the Respondent was unable to satisfactorily address the Court on why, in the absence of a formal Resolution of Parliament, there was an ongoing process to appoint 68 judges of the High Court – a number well beyond the 50-judge limit that had been set by the formal Resolution of Parliament that was appended to the reference as Annexure C.

**Applicants' Submissions in Reply**

48. In a brief reply, Mr. Rwakafuuzi contended that by advising on the availability of funds for judicial appointments and thus determining the rate of judicial appointments, the Ministry of Finance, Planning and Economic Development was assuming powers that it did not possess; and stifling the operations of one arm of Government. We understood it to be learned Counsel's contention that the Ugandan Constitution did not provide for a certificate of financial implications, neither had any such certificate been sought in 2003 when the number of High Court judges was increased to 49; therefore, once Parliament made a Resolution for number of judges it was incumbent upon the Executive to look for the funds to facilitate the recommended appointments.
49. Finally, Mr. Rwakafuuzi argued that constraining the resources (particularly human resources) available to the Judiciary was a violation of the Treaty. He prayed for costs to the Applicants whichever way the Reference was decided as, in his view, they had forced the Respondent to take action on the matters raised therein and the matter had been brought in public interest.

**Court's Determination**

50. We have carefully considered the submissions of both Parties on this issue. As we did state earlier in this Judgment, the in-action complained of by the Applicants does raise questions of legality, rule of law and good governance.
51. We find the extract from *Halsbury's Laws of England (supra)*, to which this Court was referred by learned Counsel for the Applicants, very pertinent to the issues under consideration presently in so far as it aptly posits the functionality of, as well as the interface between the principles of legality, rule of law and good governance. See *footnote 1 thereto*. For completion we reproduce the entire text from which the Applicants' extract was derived:

"The Principle of Legality. The exercise of governmental authority directly affecting individual interests must rest on legitimate foundations. For example, powers exercised by the Crown, its ministers and central government departments must be derived, directly or indirectly, from statute, common law or royal prerogative; and the ambit of those powers is determinable by the courts save insofar as their jurisdiction has been excluded by unambiguous statutory language. The Executive

does not enjoy a general or inherent rule-making or regulatory power, except in relation to the internal functioning of the central administrative hierarchy … Nor, in general, can state necessity be relied on to support the existence of a power or duty, or to justify deviations from lawful authority. Moreover, in the absence of express statutory authority, public duties cannot normally be waived or dispensed with by administrative action for the benefit of members of the public."

52. The foregoing legal jurisprudence hinges the exercise of governmental authority upon legitimate or legal foundations such as statute, common law and royal prerogative. We hasten to point out that, within the context of the EAC jurisdiction, Partner States would be governed by their national constitutions rather than royal prerogative, which is unique to the English constitutional order. Stated differently, the Executive must be able to demonstrate a lawful authority for its actions, whether common law or statutory law.
53. *Halsbury's Laws of England (supra)* does also highlight 2 important footstools of the rule of law: that as a general rule the Executive does not enjoy the prerogative to create rules that would negate statutory obligations or applicable common law practices; neither can expediency or necessity be sufficient reason for the State to justify deviations from legal authority, statute and established common law practice. It does, however, recognise that the Executive may formulate rules or regulations 'in relation to the internal functioning of the central administrative hierarchy.'
54. The present Reference raises questions about the legality of ongoing judicial appointments to the High Court, as well as the constitutionality of the certificate of financial implications. It is quite apparent that whereas no Parliamentary Resolution has ever been made increasing the number of High Court judges to 82, there is an ongoing process to increase the said number to 68. It is not even clear under what legal authority the number was raised from 49, as prescribed in the Resolution of 18th September 2003, to 52 as it stands today. Similarly, whereas extensive reference was made to the need for a certificate of financial implication from the Ministry of Finance, Planning and Economic Develoment (MFPED) prior to making judicial appointments, the legal basis for such certificate was not readily apparent.
55. As quite rightly asserted by learned Counsel for the Respondent, in *Katabaazi & 21 Others vs. Secretary General of EAC & Another (supra)* this Court did hold that, provided that there was compliance with the legal regime of a Partner State, the Court had no mandate to superintend such State on how it exercised its Executive functions. In the instant Reference, where the legal basis for the increment in the number of High Court judges to 68 has not been duly established before us, we find that the Respondent is operating outside the legal framework that it explicitly posited herein; is, to that extent, operating outside its own legal rules; and is demonstrably in contravention of the rule of law principles articulated in *Halsbury's Laws of England (supra)*. We are aware that this matter was not in issue before us but take the considered view that, it having come to our attention, it is incumbent upon this Court to make the observations it does hereby make in that regard.
56. On the other hand, the constitutionality of the certificate of financial implications referred to in this Reference is in issue herein. As highlighted in *Halsbury's Laws of England (supra)* above, as a general rule the Executive does not enjoy the prerogative

to create rules that would negate statutory obligations or applicable common law practices. However, this rule is tapered by the proviso that the Executive may formulate rules or regulations with regard to the internal functioning of the central administrative structure.

57. Further, in *Gerald Karuhanga vs Attorney General of Uganda (supra)*, an Article by Lord Justice Gross, 'The Judiciary: The Third Branch of the State' (April 2014), was cited with approval. We find the position advanced therein pertinent to a better understanding of the principle of good governance as encompassed in the doctrine of separation of powers; and the interface between the different arms of Government in that regard. It reads:-

"The proper and effective functioning of any State committed to the rule of law depends on its branches understanding and being respectful of each other's respective roles and functions. Understanding is the basis from which the branches can work together within a framework of separation of powers to maintain … the rule of law."

58. Upon due consideration of the persuasive positions advanced in the foregoing jurisprudence, we take the view that not only is it important for the internal functioning of any Central Government that the different branches thereof are understanding and respectful of each other's respective functions, as posited by Lord Justice Gross above; it is critical that they appreciate the limitations and constraints within which they each operate. Against that background, it seems to us that the emergence of the practice of certificates of financial implication in Uganda was to engender the smooth internal functioning of the Ugandan Central Government's administrative structure, giving due regard to the country's budgetary constraints.
59. Indeed, paragraph 8 of Ms. Okalany's affidavit, as well as the documentation in Annexure D thereto, highlight the financial implications of each judicial appointment to the Higher Bench (Supreme Court, Court of Appeal & High Court). As quite rightly submitted by Ms. Kaahwa, it would be futile for the Executive to effect judicial appointments then fail to provide the funds required for such appointments to take effect. Contrary to Mr. Rwakafuuzi's contention, the fact that the now appointed Chief Justice and Deputy Chief Justice were serving judicial officers at the time of their elevation as such does not suggest that their appointment to those offices had no financial implications. The financial and other emoluments due to holders of those 2 offices are much higher than such as are due to a judge of the Supreme Court or Court of Appeal, the capacity in which the Chief Justice and Deputy Chief Justice respectively previously served.
60. We are satisfied, therefore, that the rule and practice of certificates of financial implications falls within the ambit of the internal functioning of Uganda's central administrative function. Consequently, it falls within the exception to the general rule that the Executive does not enjoy the prerogative to create rules that would have the effect of circumventing the legal regime of a Partner State.
61. In the same vein, we were addressed by learned Counsel for the Respondent on the need for the President to undertake consultations on persons recommended for appointment to the higher Bench. On the other hand, learned Counsel for the Applicants referred us to the Uganda Constitutional Court's decision in *Gerald Karuhanga vs Attorney General of Uganda (supra)* that essentially constrained the

President to act within the recommendations of the Judical Service Commission. In that case it was held (Tibatemwa JCC):-

"Under Article 142, the Constitution provides for a tripartite procedure in which the Judicial Service Commission is required to compose a list of nominees and submit the list to the President. The President then makes appointments from this list and sends the names to Parliament for approval. The President can only appoint a Judicial Officer from a list that the Judicial Service Commission provides. It is therefore my considered opinion that the President cannot initiate the process of appointing any particular individual to judicial office. To allow such a process would be to undermine the independence of the Commission and in a way subject it to the direction or control of the Executive Arm of Government, contrary to Article 147 of the Constitution."

62. In the foregoing case, it was the majority position that the Judicial Service Commission was the body responsible for compiling a list of nominees for appointment to judicial office, from which list the President was obliged to make a choice of appointees for submission to Parliament. It also fronted the good governance doctrine of separation of powers, holding that the Judicial Service Commission was a body that should operate independently of the Executive and Legislature.
63. As stated earlier herein, we find persuasive direction from the position advanced by Lord Justice Gross that 'understanding is the basis from which the branches (of Government) can work together within a framework of separation of powers to maintain the rule of law.' That jurisprudence suggests that the interdependence of each branch of Government for the internal functioning of the State does not negate the doctrine of separation of powers but is, on the contrary, important for the manifestation of the rule of law.
64. In Phillips, O. H. & Jackson, P., '*Constitutional and Administrative Law', Sweet & Maxwell, 2001. 8th Edition*, p.12 it was opined:-

"A complete separation of powers, in the sense of a distribution of the three functions of government among three independent sets of organs with no over-lapping or co-ordination, would (even if theoretically possible) bring government to a stand-still. What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another."

65. Indeed, even with regard to the US (United States) Constitution, which arguably goes further than any other in applying the doctrine of separation of powers, in the case of *Youngstone Sheet & Tube Co. vs. Sawyer 343 U.S 579 (1952) as reported in Schwartz, B., American Constitutional Law, Chap. 7*, it was observed:-

"The problem that may have to be faced before long is whether the draftsmen of the constitution, in their zeal to prevent too great a concentration of power, did not provide restraints that unduly hamper the working of government."

66. In our considered view, the question that must occupy a constitutional lawyer (and by extension a constitutional court) is whether and to what extent such a separation actually exists in any given constitution. A purposive interpretation that obliterates the possibility of absurdity is of paramount importance. This position is in part informed by the existence of a school of thought that defines the Executive branch

of government to include all state or public officials who are neither legislators nor judges. By implication this would extend to the composition of a Judicial Service Commission such as that in Uganda, which performs a public function. See *Phillips, O. H. & Jackson, P., 'Constitutional and Administrative Law' (supra)*.

67. The foregoing notwithstanding, as this Court held in its decision in *East African Civil Societies Organisation Forum (EACSOF) vs. Attorney General of Burundi & 2 Others EACJ Application No. 5 of 2015*, we are aware that the interpretation of Partner States' national constitutions does not fall within our jurisdiction, neither does this Court have the jurisdiction to inquire into the legal soundness the decisions of Partner States' Constitutional Courts.
68. Be that as it may, for present purposes it would appear from the decision in *Gerald Karuhanga vs Attorney General of Uganda (supra)* that the President is obliged to select nominees for appointment to judicial office from a list of nominees that is compiled and forwarded to him by the Judicial Service Commission. It seems to us that such selection process would by necessity be premised on and informed by some sort of criteria. Against that background, Ms. Kaahwa's submission on the appointment process comprising of consultations by the President prior to making judicial appointments is neither outlandish nor far-fetched. It entails an internal management mechanism of a nation's appointment process and is the prerogative of any appointing authority.
69. Consequently, we take the view that due diligence checks and other consultations undertaken prior to judicial appointments fall within the purview of the internal functioning of a country's central administrative structure. We do not consider these pre-appointment procedures to be within the domain of this Court to superintend. Most certainly, the practice of due diligence checks cannot be said to violate the principles of rule of law or good governance as stipulated in Articles 6(d) and 7(2) of the Treaty. In fact, it seems to entrench the principle of good governance by ensuring that only appointees of most impeccable intergrity and competence are appointed to the Higher Bench in Uganda. Similarly, in the absence of statutorily prescribed time frames, it is not the duty of this Court to superintend the time frames within which the Executive implements its duties.
70. Most importantly, there was no evidence adduced in this matter that the in-action that has translated into a delay by the President to effect the judicial appointments in issue does, in fact, amount to a refusal by him to perform his duty as alleged by the Applicants. The onus lay with the Applicants to establish this for a fact. Unfortunately, save for sweeping allegations that the President's purported refusal to effect judicial appointments had violated different variants of the rule of law and good governance, the Applicants did not adduce cogent and credible evidence that established the delay in effecting the judicial appointments in issue as a refusal by the President.
71. In the result, we find no evidence of refusal to appoint judges to the Supreme Court and Court of Appeal by the President of the Republic of Uganda. We would, therefore resolve Issue No. 3 hereof in the negative. Having so found, save for our observation on the absence of a legal basis for the elevation of the number of High Court judges to 82 (which was not in issue before us), we find no contravention of Articles 6(d) and 7(2) of the Treaty as pleaded by the Applicants. We do, therefore, resolve Issue

No.4 in the negative.

**Conclusion**

72. As depicted earlier in this Judgment, the Declarations sought from this Court hinged on the alleged refusal by the President of the Republic of Uganda to appoint judges to the Supreme Court, Court of Appeal and High Court of Uganda. We note that the Prayer in paragraph (a) has been exhaustively addressed by this Court, it being a reference to the alleged refusal to effect judicial appointments occasioning a breach of the principles of rule of law and good governance in general terms. We carefully considered the principles of good governance and rule of law in our determination of the preceding issues, and found that the President's preferred course of action did not violate the said principles.
73. However, in Prayers (b), (c), (d) and (e) the Applicants specifically attributed the President's alleged refusal to interference with the independence of the Judiciary; violation of the right to a fair hearing; violation of fundamental rights and freedoms guaranteed by the Ugandan Constitution, and stifling of the Ugandan Judiciary's capacity to fulfil its constitutional mandate. Having found, as we have, that the fact of refusal has not been established before this Court, we did not deem it necessary to delve into the question as to whether or not the unproven refusal did in fact manifest the specific violations complained of therein. Perhaps more importantly, the Applicants did not address us on these specific allegations at all.
74. With respect, therefore, we are unable to grant the Declarations sought by the Applicants.
75. We note that although costs were prayed for by the Applicants, there were never in issue in the Joint Scheduling Memorandum agreed upon by both Parties. We do appreciate that ordinarily costs should follow the event, however, we take the considered view that the present Reference did clarify issues of public interest and administrative importance with regard to the process of judicial appointments.
76. We are respectfully guided by the approach of the Appellate Division of this Court which, in the case of *Attorney General of Tanzania vs. African Network for Animal Welfare EACJ Appeal No. 3 of 2014*, held:-

    "The Applicants have, against all formidable odds, partially triumphed in their quest (in this, the first Environmental Case of its kind to be brought before this Court). They brought the Reference and have prosecuted it not out of any wish for personal, corporate, or private gain; but out of the public spirited interest of the noblest kind – namely conservation and preservation of a natural resource which (in this particular case), is truly a rare heritage, one-of-a kind for all mankind. It is only fair, therefore, that neither Party be condemned to pay the costs of the other in this litigation, both here and in the Trial Court below. Rather, each Party should bear its own costs. We so order."
77. Similarly in the case of *Barclay (Guardian ad litem) vs. British Columbia 2006 BCCA 434 (CanLii)* matters of public interest were identified as exceptions to the general rule. It was held (per Mackenzie JA):-

    "The strictures of the general rules in private litigation are modified to some degree in litigation which engages a broader public interest beyond the pecuniary interests

of the particular plaintiffs who pursue the action."

78. With respect, therefore, we do hereby dismiss the Reference and order each party to bear its own costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Application No. 1 of 2013
Arising from Application No. 12 of 2012, Arising out of Reference No. 2 of 2012

**The Attorney General of the Republic of Uganda And The East African Law Society and the Secretary General of the East African Community**

Johnston Busingye, PJ, John Mkwawa, J, Isaac Lenaola, J.
May 17, 2013

*Court's inherent powers - Notice of appeal expressed as an intention to file an appeal - Stay of orders pending appeal - Security for costs inapplicable to Partner States and EAC Secretary General.*

*Rules 54 (2), 110 (1), (2) and (3) of the East African Court of Justice Rules of Procedure, 2010.*

In Application No. 12 of 2012, the 1st Respondent sought the leave of the Court to produce additional evidence in form of documentation and electronic format after the close of pleadings. Aggrieved by the Ruling delivered of 13th February 2013, the Applicant sought a stay of execution pending the determination of an intended appeal before the Appellate Division. The Applicant had already filed a Notice of Appeal.

**Held:**
1) A notice of appeal was sufficient expression of an intention to file an appeal.
2) If the Court continues with the hearing of Reference No.2 of 2012, the intended appeal would be rendered nugatory and the Applicant would be prejudiced and suffer loss if that appeal were to succeed.
3) Where a Claimant is a Partner State, the Secretary General or any of the Institutions of the Community, no security for costs shall be required.

**Cases cited:**
Angela Amudo vs the Secretary General of the East African Community Case No.1 of 2012
G. N. Combined (U) Ltd vs. A. K. Detergents (U) Ltd H.C.C.C No. 384 of 1994, [1995] iv KARL 92
Sewankambo Dickson Vs Ziwa Abby [EA] 227
The Attorney General of Uganda vs the East African Law Society – Application No.7 of 2012
Ujgar Singh Vs Rwanda Coffee Estates Ltd. [1966] E. A 263

## Ruling

**Introduction**

1. The Attorney General of the Republic of Uganda ( hereinafter " the Applicant") brought this Notice of Motion dated 14th March 2013 under the provisions of Rules 54 (2), 110 (1), (2) and (3) of the Rules of Procedure of this Court and save for the prayers on costs, the only substantive order sought is the following:
"An order doth issue to stay execution of the ruling and orders in application No. 12 of 2012 given on 13th February 2013 pending the determination of the Appeal."

**Background**

2. The Applicant was the Respondent in Reference No. 2 of 2012 from which arose Application No. 12 of 2012 which was filed by the instant 1st Respondent, namely the East African Law Society. The Applicant is aggrieved by the Ruling of this Court delivered on 13th February 2013 in the aforesaid Application ( No. 12 of 2012) and now intends to go on appeal against that ruling and orders given in favour of the 1st Respondent. It is on the basis of the foregoing that he now seeks for an order that will have the execution of the ruling and orders of this Court given on 13th February 2013 ,stayed pending the determination of the intended appeal before the Appellate Division of this Court. It may not be out of place to mention that he has filed a Notice of Appeal and that in addition, the Applicant has requested for proceedings in Application No. 12 of 2012 to enable him to file the Record of Appeal.
3. A brief recount of what transpired is a necessary preface to this Application. In Application No. 12 of 2012, the instant 1st Respondent, if we may put it in a nutshell, craved for this Court's leave to produce additional evidence in form of documentation and electronic format after the close of pleadings in Reference No. 2 of 2012.
4. It is common ground that at the Scheduling Conference, parties had consented that all evidence would be tendered by way of Affidavits. But subsequent to the Scheduling Conference, the 1st Respondent obtained evidence which they allege could not be easily obtained to be used at the Reference as it necessitated "surmounting of diplomatic hurdle and corporate red-tape".
5. It was against that background that they brought a Notice of Motion dated 2nd September, 2012 under the provisions of Rule 46 (1) of the Rules of this Court seeking for the following substantive order: "That this Honourable Court be pleased to grant leave to the Applicant to produce additional evidence in form of documentation and electronic format after the close of pleadings."
6. It is again common ground between the parties that this Court allowed the application and had this to say:
"In a nutshell, it is our view that the import of Rule 46(1) is to ensure that no evidence is shut out even after pleadings have closed and to enable the Court exercise discretion whenever necessary to do so and to afford an opposing party adequate opportunity to comment on and rebut the new evidence tendered by the other party and if necessary, file fresh evidence to contradict it."

7. In conclusion, we find no credible reason to deny the Motion and will now allow it in the following terms:
   i. The Applicant, the East African Law Society, shall be granted leave to produce additional evidence in Reference No. 2 of 2012 pending before this Court for determination.
   ii. The evidence to be produced shall be in the form of documentation and also in electronic format.
   iii. The additional evidence shall be served upon the Respondents within 21 days of this Ruling.
   iv. The Respondents are at liberty to file any evidence in rebuttal within 21 days of service of the additional evidence.
   v. Parties will thereafter appear for directions on how to proceed with the matter.
   vi. Costs of the Motion will abide the determination of Reference No. 2 of 2012.

Orders accordingly.
It is the above orders that triggered the Instant Application.

**Grounds of the Application**

8. The instant Application is based on the following grounds, contained in the affidavit of Mr. Cheborion Barishaki, the Director Civil Litigation, sworn on 7th March 2013 on behalf of the Applicant. Briefly stated they are:
   i. That the Applicant lodged a Notice of Appeal against the whole Ruling in Application No. 12 of 2012 and accordingly requested for the record of proceedings to enable him file a record of appeal.
   ii. That substantial loss will result to the Applicant unless the order is made.
   iii. That the intended appeal has high chances of success.
   iv. That if this Court does not grant a stay of execution of the orders in Application No. 12 of 2012, it will render the intended appeal nugatory.
   v. That if this Court does not grant a stay of executive the orders in this Application No. 12 of 2012, the Applicant shall suffer extreme prejudice in as far as all prior proceedings including conferencing and submissions shall be rendered nugatory and would likely result in a mistrial.
   vi. That this Application has been brought without any unreasonable delay.
   vii. That it is just and equitable in the circumstances that this Court orders for a stay of execution of the orders issued in Application No. 12 of 2012 pending hearing and final determination of the intended Appeal to the Appellant Division.
9. The 2nd Respondent filed no response to the Application while the 1st Respondent elected to proceed under Rule 41 of the Court's Rules of Procedure and filed no Affidavit, but relied on preliminary points of objection filed on 3rd May 2013. The preliminary points of objection are the following:
   i. That the application is an abuse of the process of the Court in so far as the same has been overtaken by events, i.e. that the application seeks to stay the execution of orders of this Court issued and/or given on 13th February, 2013 which are spent and not available for challenge in any way.
   ii. The Application as drawn and crafted does not relate to a decree; only a decree

is capable of execution while an order is capable of compliance, obedience, observance and being abided by.

iii. The Application is devoid of merit, lacks foundation and is fatally defective in as much as it is misconceived.

It is the Respondent's argument, in a nutshell, that the order should not be granted.

**Submissions**

10. Mr. Mwaka, Principal State Attorney, who appeared for the Applicant, in his submissions, told the Court that when it comes to an application for stay of execution the law provides for a number of conditions to be met. The conditions are:
11. One, that an Appeal must have been filed. He, however, admitted that there has been debate as to when an appeal is effectively filed and one contention is that an Appeal is effectively filed when the memorandum of appeal is filed. But, that there are also judicial authorities which say that mere filing of a Notice of Appeal is sufficient and he preferred the latter argument. In support of this contention he referred us to a decision of the High Court of Uganda at Kampala, namely, *Application No. 178 of 2005 Sewankambo Dickson Vs Ziwa Abby [EA] 227* which quoted with approval a decision of the defunct East African Court of Appeal, namely *Ujgar Singh Vs Rwanda Coffee Estates Ltd. [1966] E. A 263* where Sir Clement De Lestang, Ag. V. P. stated inter- alia that "…It is only fair that an intended Appellant who has filed a notice of appeal should be able to apply for a stay of execution to the Court …as soon as possible and not have to wait until he has lodged his appeal to do so."
12. It was further submitted by Mr. Mwaka, that over the years, Courts have established three conditions for determination of applications for stay of execution:-
    (a) That substantial loss may result to the Applicant unless the order of stay is made;
    (b) That the application has been made without unreasonable delay; and
    (c) That security for costs has been given by the Applicant.
13. Mr. Mwaka avers that substantial loss may result if the execution of the impugned orders of this Court are executed in that the 1st Respondent (then the Applicant) was in effect allowed to produce open-ended evidence which traverses Masaka, Lira and Jinja areas instead of the original incidents around the city of Kampala. It is his submission therefore that, since the new incidents are over one hundred (100) this is more or less twenty (20) times more than the original evidence which was filed. He further contended that if the new affidavit were allowed, it will have the effect of introducing evidence which would absolutely change the nature and character of the whole Reference to the prejudice and suffering of the Applicant. He then referred us to the recent decision of the Supreme Court of Kenya in *Petition No. 5 of 2013 – Raila Odinga v The Independent Electoral and Boundaries Commission and 3 Others as consolidated with Petitions No. 3 and 4 of 2013* where the Court rejected filing of further affidavits for a number of reasons including the Constitutional limitation of time within which to determine the Petition. In that case, Mr. Mwaka contended that the further affidavit was rejected at Conferencing whereas in this case, Conferencing had already been done, pleadings were closed and even submissions had been completed before the new evidence was introduced.

14. Mr. Mwaka's next line of attack was that if the instant application is not granted, the appeal that he intends to pursue with the Appellate Division of this Court will be rendered nugatory. It is also his argument that the fifth (5th) order given in the impugned Ruling is to the effect that parties will appear for directions on how to proceed with the matter.
15. He contended that it is his understanding that the appearance for directions on how to proceed with this matter would be similar to conferencing and it is his argument that re-conferencing the matter will require them to file new submissions or additional submissions in view of the new evidence tendered by the 1st Respondent. So, at this stage, if the order of stay of execution is not granted, the Applicant will find himself even more prejudiced than he already is, by inter- alia, lack of time and the fact that the re-conferencing would likely lead to a mistrial because of the change of the nature and character of the Reference.
16. It is his stance, therefore, that it is only equitable that parties be allowed to await the outcome of the decision of the Appellate Division of this Court.
17. On the requirement for security for costs, it is his submission that pursuant to the loud and clear provisions of Rule 115 (2) of the Court's Rules of Procedure, the Applicant is absolved from the requirement for costs. The aforesaid Rule states as follows:
"(2). Provided that where a claimant is a Partner State, the Secretary General, or any of the institutions of the Community no security for costs shall be required".
18. It is Counsel's contention therefore that the Applicant, being a party to the Treaty, cannot be condemned to deposit security for costs as whatever funds that will come by way of security for costs would come from the Consolidated Fund of Uganda and Uganda being a sovereign State cannot be treated the same way as a Corporation and there is, therefore, no need to deposit security for costs in Court.
19. Mr. Mwaka concluded his submission by saying that the Applicant by going on appeal is seeking from the Appellate Court specific guidance, *inter alia*, on the following:
(a) At what stage of the proceedings in Court can new evidence be allowed
(b) On what grounds? and
(c) How urgent should the grounds be to allow the new evidence to be presented?
For the above reasons Mr.Mwaka argues that this is a fit and proper case for grant of the orders of stay as prayed.
20. In rebuttal, Mr. Mtuy who represented the 1st Respondent in this Application told the Court that he was resisting the Application and in support of his stance he reiterated the points he had raised in the Preliminary points of objection which are reproduced elsewhere above and we need not re-state them.
21. Apart from the foregoing, Learned Counsel submitted that as indicated earlier on, the 1st Respondent encountered a lot of hardship in getting the required evidence in support of their Claim, particularly the video evidence due to the political tension and insecurity prevailing in Uganda at that time.
22. It is his stance that the new evidence which was in the nature of electronic print was not only necessary but relevant to enable this Court make a fair and unbiased decision and to meet the ends of justice.
23. Counsel's counter-argument in respect of Mwaka's fear of a re-conference was brief and clear. He submitted that the Ruling of the Court on 13th January 2013 had

made it amply clear that:
"The Respondents are at liberty to file any evidence in rebuttal within 21 days of service of the additional evidence" (see (iv) at pg.7 of the Ruling in question).

24. It is Mr. Mtuy's argument in that regard that the Applicant is in no way prejudiced as he has ample time to file any evidence in rebuttal to the new evidence tendered by the 1st Respondent.
For the above reasons he prayed that the Application be struck out with costs.

**Determination of the Application**

25. We have carefully addressed our minds to the arguments by both Counsel appearing and we opine as follows: One that we note that the Applicant herein has only lodged the notice of appeal and not the record of appeal although he has applied for the said record.
27. We are alive to the fact that like Bamwine J stated in *Sewakambo(supra)* authorities appear inconsistent on this area of Law, some stating that the lodgment of a notice of appeal is an intention to appeal and cannot amount to the actual appeal that must be lodged by filing a memo of appeal, record of appeal, payment of fees and security for costs (see *G. N. Combined (U) Ltd – vs.- A. K. Detergents (U) Ltd H.C.C.C No. 384 of 1994 reproduced in[ 1995] iv KARL 92*)
28. On our part, we fully agree with the reasoning in *Ujagar Singh (Supra)* and the *Sewankambo case (supra)* and we respectfully associate ourselves with the position that a notice of appeal is a sufficient expression of an intention to file an appeal as rightfully submitted to us by Mr. Mwaka and that such an action is sufficient to found the basis for grant of orders of stay in appropriate cases.
29. Two, having so found and held, we will now consider whether the instant Application meets the requirements for orders of stay of execution as prayed namely;
    (a) That substantial loss may result to the applicant unless the order of stay is made;
    (b) That the application has been made without unreasonable delay; and
    (c) That security for costs has been given by the Applicant.
30. On the first requirement, Mr. Mwaka's main argument was that the impugned Ruling, in essence, added new causes of action to the Reference at the close of the case and long after submissions had been filed and the only action remaining to be undertaken before judgment was the highlighting of those submissions. The effect was that the Applicant was greatly prejudiced and was ambushed by the new evidence tendered by the 1st Respondent. That therefore, he was unable to effectively respond to the new issues raised as the character and nature of the Reference as initially filed had completely changed.
31. Mr. Mwaka , therefore ,contended that the orders sought would have the effect of maintaining the status quo to enable the Applicant seek from the Appellate Division of this Court, guidance on what he described as "the fundamental issues, as to what stage in the course of proceedings can new evidence be adduced and on what grounds." That failure to grant the orders of stay would render the appeal preferred by the Applicant nugatory and he will thereby suffer substantial loss.
32. Mr. Mwaka's arguments on this limb were not, in our considered view, seriously and meaningfully assailed by Mr. Mtuy. The latter, as we have shown much earlier in this

Ruling, filed Preliminary points of Objection on three Points of Law but in fact all were issues of fact that were not vindicated by way of evidence in an affidavit as the law and practice would demand. With respect to the Learned counsel, we find no substance in the points raised by Mr. Mtuy, and so we propose to dispose of them only very briefly by saying that they are misconceived and incompetent, in that in the impugned Ruling (the subject matter of the instant Application), we gave seven orders and to-date only one of them has been complied with. It cannot, therefore, be said that the "instant Application is an abuse of the Court process in that the impugned orders have been fully complied with or that what the Applicant seek to stay is spent and not available for challenge in any way."

33. In view of all the foregoing, we are of the firm view that the Applicant has satisfied the first requirement because this Court is alive to the fact that if it continues with the hearing of Reference No.2 of 2012, the intended appeal will be rendered nugatory and the Applicant will be prejudiced and suffer loss if that appeal were to succeed.
34. As regards the second requirement, namely, that the Application has been made without unreasonable delay, we opine as follows:
35. The impugned Ruling was delivered on 13th February 2013 and the Applicant lodged a Notice of Appeal on 4th March and accordingly on the same day requested for the records of proceedings to enable him file a record of appeal. Happily, he was not challenged on this. It cannot, therefore, by any stretch of imagination be said that there was a delay on the part of the Applicant. It does appear to us that the Application was made without unreasonable delay.

    We, accordingly, find and hold that the second requirement is also in the Applicant's favour.
37. This leaves only the third requirement, namely, payment of security for costs. The Applicant in the instant Application is the Attorney General of the Republic of Uganda. Mr. Mwaka has urged us to invoke the provisions of Rule 115 (2) of the Court's Rules of Procedure to exempt him from the requirement of security of costs.
38. We need not labour on this point as the aforesaid provision is loud and clear that "where a Claimant is a Partner State, the Secretary General or any of the institutions of the Community, no security for costs shall be required." (the underscoring is ours). The Applicant has been sued for and on behalf of the Republic of Uganda which is a Partner State and therefore exempt from the requirement for payment of security for costs.
39. Before we leave this matter, we wish to say the following: That pursuant to Rule 1 (2) of this Rules of this Court, this Court has inherent powers to grant the Applicant's prayers. The aforesaid Rule gives the Court inherent power to:

    "Make such orders as, may be necessary for the ends of Justice……"

    The main principle to be applied is whether the dictates of justice so demand. This court has done so in a number of similar cases. (See *The Attorney General of Uganda vs the East African Law Society – Application No.7 of 2012 and very recently in Angela Amudo vs the Secretary General of the East African Community Case No.1 of 2012*)
40. In view of the foregoing, we accordingly grant the Application as prayed, and order that:

    a) The orders issued in Application No. 12 of 2012 be stayed pending the determination

of an intended appeal by the Applicant, which must be filed strictly in accordance with Rules of this Court.

b) The costs of the application shall abide the outcome the intended Appeal.

We so order.

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East African Court of Justice – First Instance Division
Application No. 2 of 2013

**Avocats sans Frontier And Mbugua Mureithi wa Nyambura, Attorney General of Uganda, Attorney General of the Republic of Kenya**

Jean-Bosco Butasi PJ, John Mkwawa J, Isaac Lenaola J
August 28, 2013

*Judicial discretion to admit of amicus curiae - No apparent bias and independence of the amicus curiae.*

*Rule 36 of the East African Court of Justice Rules of Procedure, 2013-*

The first Respondent filed Reference No. 11 of 2011 against the 2nd and 3rd Respondents alleging that they had violated the Treaty when their agents arrested and detained him between 16th and 17th September, 2010 without following due process.
The Applicant, a non-governmental organisation registered in Belgium, sought the leave of the Court to make written and oral submissions at the hearing of the Reference as amicus curiae.

**Held:** One of the fundamental considerations for any amicus curiae to be admitted is that such a Party must be independent of the dispute between the Parties. There was no bias apparent on the part of the Applicant and their admission would not prejudice to any Party thus the applicant was allowed.

**Cases cited:**
AG of Uganda v Silver Springs Hotel Ltd and Others SCCA No. 1 of 1989.
East African Law Society v Secretary General, EAC and Others, EACJ Application No.1 of 2009
Fuad, J. in Dritoo v Nile District Administration [1968] E.A. 428
Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 713 (CC)

**Ruling**
1. The Applicant herein is Avocats Sans Frontiers, a Non-Governmental Organization founded in Belgium in 1992 with registered presence in the Republics of Burundi and Rwanda, both Partner States in the East African Community.
2. By its Notice of Motion dated 3rd May, 2013, it has sought orders for leave to intervene as Amicus Curiae in Reference No. 11 of 2011 between Mbugua Mureithi wa Nyambura and the Attorneys General of the Republics of Uganda and Kenya. It also seeks that upon leave aforesaid being granted, it should be allowed to make written and oral submissions at the hearing of the Reference.
3. The Notice of Motion is premised on the provisions of Rule 36 of this Court's Rules

of Procedure, 2013.

4. In the grounds in support of the Motion and in the Affidavit in support thereof, sworn by Francesca Bonniotti, its Executive Director, it states that it wishes to join the proceedings as amicus curiae for the following reasons:-
   i) that it wishes to contribute to *inter-alia*, the Treaty for the Establishment of the East African Community with regard to the independent of, and freedoms and fundamental rights of lawyers and Law Societies in the East African region, generally.
   ii) that it is able to make a unique contribution to the Reference without taking away the litigation of the Reference from the Parties to it.
   iii) That the reasons for the intervention far outweigh any potential opposition for the intervention by existing Parties and will instead assist the Court in its mandate of interpreting the Treaty and advancing respect for the Rule of Law in the Community.
5. The Attorney General of Uganda in opposition to the Motion filed an Affidavit in Reply sworn by George Kallemera, Senior State Attorney and it is his argument that the motion is frivolous and lacks merit because:-
   i) there is no exceptional or technical contribution the Applicant possesses that the Court cannot obtain from existing Parties to the Reference.
   ii) The Applicant's core function is contrary to the whole purpose of amicus curiae and will not in any way assist the Court in resolving the dispute contained in the Reference.
   iii) that the Applicant does not hold or execute any Constitutional or Statutory office or function to qualify as Amicus Curiae.
   iv) that the Applicant's intervention is intended to revamp the case for the Applicant in the Reference and that is contrary to the spirit of an amicus curiae which is meant to be an independent Party.
6. The Attorney General of the Republic of Kenya has not filed any response but opposes the Application on point of Laws only.
7. The Applicant in the substantive Reference seems to have no objection to the Application but filed no formal response. The Submissions of his Advocate point in the former position in any event.
8. We have considered the Application, the responses to it and the oral submissions for the Parties and would humbly opine as follows:-
   i) Firstly, as was held by Fuad, J. in *Dritoo vs Nile District Administration [1968] E.A. 428*, "the Court has a wide discretion to ask for assistance of a curiae if it considers that the interests of justice would be served".
   ii) Further, Rule 36(4) of this Court's Rules of Procedure, 2013, with regard to an application to join existing proceedings as amicus curiae provides that "if the Application is justified", then it shall be allowed which is also an expression of discretion on the part of the Court. Like all discretion, however, it must be exercised judiciously.
   iii) *Black's Law Dictionary, 7th Edition*, defines an *amicus curiae* as "a person who is not a Party to a Law suit but who petitions the Court to file a brief in the action because that person has a strong interest in the subject matter".

iv) Secondly, in any application as above, the Applicant is required by Rule 36(2)(e) of the Court's Rules of Procedure to file an application which shall contain *inter-alia* a "statement of the intervener's or amicus curiae's interest in the result of the case".

9. While the Respondents argued forcefully that the statement of interest must be a separate document from the Motion itself, we find no justification for such a position and in our view, it is sufficient that the interest is clearly and succinctly set out in the Affidavit or body of the Application itself.
10. In any event, Rule 36(4) is the operative rule in terms of the substance of the amicus curiae's intervention and we see no obligation to the filing of such a statement at the time of seeking leave.
11. Thirdly, having so stated, one of the fundamental considerations for any amicus curiae to be admitted is that such a Party must be independent of the dispute between the Parties – see *AG of Uganda vs Silver Springs Hotel Ltd and Others SCCA No.1 of 1989*.
12. With the above background, we have read the Articles of Association of the Applicant and one of the purposes for which it was established was "the promotion and the protection of human rights, particularly – but not exclusively – the right relating to a fair trial and the exercise of the rights of the defence".
13. Further, that, in the discharge of its functions, it may have access to any Court of Law, *inter-alia* to defend or promote the above purpose – (see Article 3 thereof).
14. It has also indicated that it will seek to limit its intervention to matters of law only and will not in any way descend to the arena of the dispute between the Parties.
15. Whereas there is strong opposition to the Motion, we have seen no bias apparent on the part of the Applicant and we are convinced that it will bring issues of law that would assist the Court in reaching a fair determination of the matters in contest.
16. The Court will also be vigilant and ensure that the Applicant will not overstep its *amicus curiae* brief and ensure that its actions do not favour any of the Parties.
17. This Court has previously allowed amicus curiae to appear before it, e.g. the *East African Law Society vs Secretary General, EAC and Others, Application No.1 of 2009* and benefitted greatly from the intervention.
18. In the present case, we see no prejudice to any Party if the application is granted and we find that the Motion is justified and in enjoining it as amicus curiae and in return for the privilege of participating in the proceedings without having to qualify as a Party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court – see *Re Certain Amicus Curiae Applications: Minister of Health and Others vs Treatment Action Campaign and Others 2002 (5) SA 713 (CC) at para.5*.
19. For the above reasons, the Motion is allowed and Avocats Sans Frontiers is enjoined as *Amicus Curiae* in Reference No.11 of 2011.
20. There shall be no order as to costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Application No. 3 of 2013

Arising from Reference No.4 of 2013

**Henry Kyarimpa And The Attorney General of the Republic of Uganda**

Jean-Bosco Butasi, PJ, Mary Stella Arach-Amoko, DPJ, John Mkwawa, J, Isaac Lenaola, J, Faustin Ntezilyayo, J
November 29, 2013

*Balance of convenience- Irreparable harm - Prima facie case – Whether the implementation of Karuma Hydro Power Project should be stopped.*

*Articles 38(2) and 39 of the Treaty Establishing the East African Community - Rules 21, 41 and 73 of the East African Court of Justice Rules of Procedure, 2013.*

In Reference No 4 of 2013, the Applicant, a procurement specialist, sought orders challenging the signing of a Memorandum of Understanding (MOU) between the Government of the Republic of Uganda and the then Interested Party, Sino Hydro Corporation Limited(since struck off the proceedings) for the construction of the Karuma Hydro Electric Power Plant in Uganda. The Applicant deponed that he was involved in the tender process that led to the MOU and that by awarding the contract to Sinohydro, the Respondent infringed Articles 6, 7(2), 8(1)(c) and 27(1) of the Treaty. He claimed that a competitor company, M/S China International Water and Electricity Corporation had won the bid.

The Applicant sought a cancellation of the Memorandum of Understanding and reinstatement of the status quo. Pending the determination of the Reference, the Applicant prayed for interim orders *inter alia* restraining or generally staying the implementation of the Karuma Hydro Power Project between the Government of Uganda and Sinohydro Corporation Limited. He claimed that he would suffer loss of fees and commission.

In their response, the Respondent averred that by the time H.C. Misc. Application No.11 of 2013 was filed and orders issued, all tenders had been cancelled and that there was an appeal before the Court of Appeal of Uganda against those orders. Further, the tender awarded to Sinohydro was made within the law and in a transparent manner.

**Held:**

1) The issues raised require more than a cursory glance as they are serious enough to warrant interrogation within the meaning of Article 30 of the Treaty as read with Articles 6(d), 7(2) and 38(2), thereof.
2) Whereas some harm may afflict the Applicant if the injunction is not granted, largely, that harm can be compensated in damages.

3) The construction of the Karuma Hydro Power Plan has already commenced, funds have been pumped into it and the consequences of stoppage may not be bearable to the tax payer in Uganda. Thus the balance of convenience tilts in favour of the Respondent. The Applicant's application was disallowed.

**Cases cited:**
American Cyanamid Co v Ethicon Ltd [1975] All E.R. 504 at 510
Giella v Cassman Brown & Company Ltd [1973] E.A 358
Kahoho v Secretary General of the EAC, EACJ Application No. 5 of 2012
Mary Arviza & Others v. AG of Kenya & Others Application No. 3 of 2010

**Ruling**

1. The present Application arises from Reference No.4 of 2013 where the Applicant had invoked Articles 6, 7(2), 8(1(c), 23, 27(1) and 30 of the Treaty for the Establishment of the East African Community (hereinafter "the Treaty") in seeking orders challenging the signing of a Memorandum of Understanding between the Government of the Republic of Uganda and the then Interested Party, Sino Hydro Corporation Limited (since struck off the proceedings) for construction of the Karuma Hydro Electric Power Plant in Uganda. Of importance at this stage is the prayer in the Reference that the said Memorandum of Understanding should be cancelled and the status quo obtaining before the selection of Sino Hydro Corporation Limited (hereafter "Sinohydro") be reinstated.
2. Before the Reference could be heard, the Applicant filed a Notice of Motion under the provisions of Articles 38(2) and 39 of the Treaty as well as Rules 21, 41 and 73 of this Court's Rules of Procedure seeking the following orders:
   "a) An interim order by way of a temporary injunction doth issue restraining, preventing and/or generally staying the implementation of the 600MW Karuma Hydro Power Project between the Government of Uganda and Sinohydro Corporation Limited or in any way:
      i) Performing any of the scheduled activities under the Memorandum of Understanding including contract negotiations and the signing of the EPC contract for the project.
      ii) Government of Uganda negotiating financing terms with China Exim Bank and obtaining disbursements.
      iii) Launching the on-site construction activities of the project by Sinohydro Corporation Limited.
      iv) Mobilization by Sinohydro Corporation Limited of engineers and technicians for the project to carry out further site investigations, detailed construction planning and design works.
      v) Carrying out of preparatory works in annex A to the Memorandum of Understanding until the hearing and final disposal of the main Reference No.4 of 2013.
   b) Cost of this application be in the cause."
3. In the supporting Affidavit sworn on 24th June 2013 by the Applicant and from the

grounds in support of the Motion as well as submissions by learned counsel for the Applicant, his case can be summarized as follows:

4. That as a citizen of the Republic of Uganda and East Africa, he has a civic duty to enjoy the observance of the rule of law, good governance, accountability and democracy by the Government of Uganda and any breaches of the Treaty would adversely affect and prejudice his well-being, trade and business in both Uganda and the East African Region. In that regard, as a procurement specialist, he is aware of the laws, regulations and the practice of public procurement under the Public Procurement and Disposals Act, 2003. That as an adviser to M/S China International Water and Electricity Corporation (hereinafter "China International"), a competitor to Sinohydro in the bid for the construction of the Karuma Power Plant, he was also aware of , and was involved in the tender process that led to the MOU under attack, hence his interest in it.
5. It is his further case that the bid aforesaid was actually won by China International but a report by the Inspector General of Government (IGG) led to it not being notified of its successful bid and for that reason, it went to Court in H. C. MISC. Cause No.11 of 2013 (Uganda) and the IGG's report was quashed and the Court further directed that the contract should be awarded to the best evaluated bidder which should have been China International and not Sinohydro or any other bidder.
6. That the Attorney General of Uganda then confirmed the above position by a letter dated 11th April, 2013 to the Ministry of Energy and Mineral Development of the Republic of Uganda but without complying with the said Court order, the contract was instead awarded to Sinohydro ,unilaterally, and the Memorandum of Understanding aforesaid was then signed on 20th June, 2013, a month after the order of the High Court had been issued.
7. That, therefore, the said actions on the part of the Government of Uganda are inconsistent with, and are an infringement of Articles 6, 7(2), 8(1)(c) and 27(1) of the Treaty and unless an interlocutory injunction is granted as prayed, "M/S China International Water and Electricity Corporation shall suffer irreparable loss, injury and damage that cannot be compensated by way of damages"
8. In addition that he, the Applicant, stands to "lose his fees and commission as a procurement specialist" and there would be loss of confidence in the procurement industry in Uganda and the East African Region generally.
9. The Respondent, the Attorney General of the Republic of Uganda, in his Affidavit in Reply sworn on his behalf on 21st August, 2013, by one Christopher Gashibarake, Commissioner for Litigation in the Respondent's office ,urges the point that the Motion is devoid of merit for reasons that:
    i) when the initial tender process for the construction of the Karuma Hydroelectric Plant was found to have been permeated by allegations of corruption, the IGG intervened and later, the Cabinet of the Republic of Uganda instructed the cancellation of all bids and tenders which action was then effected by the Contracts Committee of the relevant Ministry and this was in line with unspecified provisions of the Public Procurement and Disposals Act of Uganda;
    ii) by the time H.C. Misc. Application No.11 of 2013 was filed and orders issued, all tenders had been cancelled and the said orders were thereafter rendered "lifeless

and spent";

iii) there is, in any event ,an appeal before the Court of Appeal of Uganda against those orders and there are no contempt orders sought or made against the Respondent for any violation of the said Orders;

iv) the tender awarded to Sinohydro was made within the law and in a transparent manner and all other bidders, including China International, were aware of the cancellation of the initial tender process and;

v) that the implementation of the MOU has long been undertaken and the present Application is merely being used as a scheme to secure the payment of fees based on a self-enriching private arrangement between the Applicant and China International.

vi) that, therefore, the Motion ought to be dismissed with costs.

10. We have taken note of the contents of an Affidavit in Rejoinder sworn on 26th September, 2013 by the Applicant together with the annextures thereto. We also note that, at the hearing of the Motion, the Applicant abandoned prayers (a) (i) and (v) and so this Ruling is limited to prayers (a) (ii), (iii), (iv) and (b), the latter being on costs.

11. In submissions, Counsel appearing for both parties agreed that in determining whether to grant or deny the prayer for an interlocutory injunction, the Court has to determine that:

i) the Applicant has made out a prima facie case with a probability of success;

ii) failure to grant the injunction will occasion the Applicant irreparable harm that cannot be compensated by an award of damages and;

iii) If the Court is in doubt, then it will determine the Application on a balance of convenience – see *Giella Vs. Cassman Brown & Company Ltd[1973] E.A 358* and *American Cyanamid Co vs. Ethicon Ltd [1975] All E.R. 504 at 510*.

12. We agree and these are the principles we shall invoke in determining the Motion.

**Prima Facie Case**

13. The Applicant's argument on this point is that because the contract with Sinohydro was not made in compliance with the *Public Procurement and Disposal Act, No.19 of 2003 and Regulations No.70 of 2003*, then the Government of Uganda acted in breach of the principles set out in Articles 6, 7 and 8 of the Treaty and specifically the principles relating to good governance, transparency and accountability.

14. Further, that since there were Court Orders issued initially on 18th April, 2013 and later on 22nd April, 2013 by the Deputy Registrar of the High Court of Uganda in H.C. Misc. Application No. 11 of 2013 and confirmed by Hon. Lady Justice Faith Mwondha on 20th May 2013, the Government of Uganda acted in contempt of the principle of the Rule of Law when it ignored those Orders and proceeded to award the Karuma Hydro Power Plant contract to Sinohydro, unilaterally. This was done, it was argued, contrary to the principle in Article 6(d) of the Treaty that all Partner States in the East African Community shall adhere to the doctrine and principles of rule of Law in their undertakings, and also a breach of Article 38(2) which enjoins them to minimize the damage of any undertaking while a matter in dispute is before this Court.

15. The Respondent took a wholly contrary position for reasons set out above and which we do not need to repeat.
16. On our part, we are aware that at this stage, we cannot delve into the merits of the whole Reference neither should we make any determinate findings as to its substance. Suffice it to say therefore that the issues raised above are not idle and as stated by Lord Denning in the *American Cynamid Case (Supra)*, if the issues raised are arguable then the first hurdle has been passed. Similarly in *Mary Arviza & Others vs. AG of Kenya & Others Application No. 3 of 2010*, this Court stated that upon reading the Reference, replying Affidavits and upon hearing Submissions from the parties, the totality of the facts disclosed bona fide serious issues to be investigated by the Court, but warned itself nonetheless that it must refrain from making a decision on the merits or demerits of the case which should await the full hearing of the Reference.
17. We shall take the same approach and will only restate the fact that the matter placed before us for consideration by the parties would lead us to conclude that the issues raised require more than a cursory glance as they are serious enough to warrant interrogation within the meaning of Article 30 of the Treaty as read with Articles 6(d), 7(2) and 38(2), thereof. In other words, the Reference is neither frivolous nor vexatious.

**Irreparable harm**

18. In his submissions on this point, learned counsel for the Applicant argued that contrary to the Respondent's assertion, the Reference is not about a selfish scheme by the Applicant to enrich himself by earning fees for his consultancy work with China International. That in fact, the gist of his complaint is that the principle of the rule of Law has been trampled upon by the actions of the Government of Uganda and the harm thereby caused to the procurement industry, China International and himself can never be compensated by damages.
19. The Respondent on the other hand, was emphatic in response that the Applicant's fees are quantifiable and payable in the event that the Reference succeeds and so is the claim he has made on behalf of China International.
20. We agree with the Respondent on that point for the reason that professional fees are specific and the tender amount for the project is also specific and to state otherwise would be unreasonable. But as regards compensation in damages for breach of the principle of the rule of Law, the Respondent's argument becomes doubtful and we shall shortly explain why. The one on damage to the procurement industry is on the other hand quite far-fetched and speculative and we shall say little of it.
21. On alleged irreparable harm for breach of the principle of the rule of Law in Article 6(d) of the Treaty, we have perused the following decisions submitted by the Applicant:

a) *Nasser Kiingi & Another vs. AG another, C. A. Const. Appl. No. 29 of 2011 (Uganda)* where the Court stated that no amount of monetary compensation can be accorded to a person whose non-derogable rights under the Constitution have been violated.
b) *Grace Bororoza & 53 Others vs. Dr. Kasirivu & 51 Others* where the holding in (a) above was repeated and the Court went further to hold that violation of non-derogable rights is "irreversible and cannot be addressed by payment of any amount of money."

22. We must say that the argument above, made in the context of the Bill of Rights in a Constitution, has not been sufficiently addressed to align it with the principles in the Treaty which Partner States must adhere to. It is therefore debatable whether the argument made can be sustained in that context but taking all matters into perspective, we are satisfied that whereas some harm may afflict the Applicant if the injunction is not granted, largely, that harm can be compensated in damages.

**Balance of Convenience**

23. On this issue, little was said by the Applicant but we gather that for reasons that the Treaty was allegedly violated and court orders were disobeyed, the balance of convenience must tilt in his favour.
24. The Respondent on the other hand argued that the project was a God-send and that its existence will bring forth employment opportunities, social amenities, an improved road network and an enhanced standard of living for the people of Uganda. That therefore, the balance of convenience is in his favour and not in favour of the Applicant who will not be prejudiced in any way should the orders be denied.
25. We have considered the matter before us in totality and whatever the merits or otherwise of the Applicant's case, the construction of the Karuma Hydro Power Plan has already commenced. Funds have certainly been pumped into it and the consequences of stoppage may not be bearable to the tax payer in Uganda.
26. Further, a number of parties have been named as having an interest in this matter but they are not before us. They include the principal player in the offending MOU, namely, Sinohydro as well as China International and Exim Bank China. To issue Orders that may affect them adversely without hearing them would not enhance the rule of Law and would instead violate it. In the end and with extreme reluctance, we are minded to the position that the balance of convenience must tilt in favour of the Respondent.
27. In saying so, we are aware that the grant of an interlocutory injunction is an exercise of the Court's discretion which must be exercised judiciously at all times - see *Kahoho vs. Secretary General of the EAC, EACJ Application No. 5 of 2012*.
28. In exercise of that discretion in the present case, we find that we are unable to grant the Motion as prayed but will instead dismiss it with a further order that costs shall abide the determination of the Reference.
29. However and in the wider interests of justice, we hereby order that to bring the whole controversy to a quick resolution, Reference No. 4 of 2013 shall be fast-tracked and heard and determined in the earliest.

Orders accordingly.

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East African Court of Justice – Appellate Division

Appeal No. 1 of 2013
Appeal from the Ruling in Application No. 12 of 2012 of the First Instance Division by: Johnston Busingye, P.J; John Mkwawa J, & Isaac Lenaola J, dated 13th February 2013

**The Attorney General of the Republic of Uganda And The East African Law Society and the Secretary General of the East African Community**

Before: Philip K. Tunoi, V.P; James Ogoola, JA, Liboire Nkurunziza, JA
November 29, 2013

*New evidence - Rebuttal of new evidence - Standards governing the exercise of judicial discretion - Whether the First Instance Division exercised its discretion properly.*

*Rules 1 and 46 of the East African Court of Justice Rules of Procedure, 2013*

The Reference before the First Instance Division pertained to the walk-to-work protests undertaken by Ugandan Citizens in various cities of the Country following the results of the 2011 General Elections for which the Applicant/ 1st Respondent sought redress.

At the scheduling conference, on 23rd February, 2012, the parties agreed, *inter alia*, that all evidence would be adduced by way of Affidavit. Subsequently, the 1st Respondent sought leave of the Court to produce electronic evidence and on 13th February, 2013, the First Instance Division granted the Applicant / 1st Respondent leave to adduce the additional evidence in the form of documentation and also in electronic format.

**Held:**

1) Where the new evidence is critical to the determination of the case at hand, the Court's currency should invariably be tendered in substance over form.
2) The so-called new evidence was not all that "new" at all and there is a distinction between new evidence in a trial and evidence adduced to elucidate, expound, or clarify evidence already on the Court's record. Further, no prejudice would be occasioned to the Appellant from the admission of the new evidence as a reasonable opportunity would be provided for them to respond to and to rebut the new evidence.
3) The trial Judges had acted within their discretion and in accordance with the Law and the established principles and standards governing the exercise of judicial discretion.

**Cases:**

American Express International Banking v. Atul [1990-1994] EA 10 (SCU)
Armed Activities on the Territory of the Congo (Uganda) CR 2005/2 (11 April 2005)
G.M. Combined Ltd v. A.K. Detergents Ltd, Supreme Court, Uganda, Civil Appeal No. 7/1998

Kasikili/Sedudu Island Case ICJ Reports [1999-II], pp. 1045
La Grand Case,ICJ Reports [2001],pp. 466
Ladd vs. Marshall (1954), CA 745
Nottebohm Case (Second Phase) ICJ Reports [1955]

**Judgment**

**Introduction**

1. This is an interlocutory appeal against the Ruling of this Court's First Instance Division dated 13th February 2013, by which that Division granted leave to the East African Law Society (the "1st Respondent") to adduce additional evidence in the form of documentation; and in electronic format in Reference No. 2 of 2012.
2. Dissatisfied with the above Ruling, the Attorney General of the Republic of Uganda (the "Appellant") appealed that Ruling to this Appellate Division. He proffered the following three grounds for the Appeal, namely that the Learned trial Judges of the First Instance Division erred in law:
   (i) when they misapplied the principles governing the reception of new evidence;
   (ii) when they unduly exercised their discretion in predetermining the relevance of the additional evidence;
   (iii) by occasioning prejudice on the Appellant when they allowed additional evidence to be adduced by the 1st Respondent while the case was pending highlighting of the Parties' submissions and delivery of the judgment.
3. At the Scheduling Conference of this appeal, the above three grounds of appeal, were consolidated into the following single ground:
   Whether the learned trial Judges of the First Instance Division properly exercised their discretion in allowing the 1st Respondent leave to adduce additional evidence?

**Background**

4. On 31st May, 2011, the 1st Respondent lodged a Reference before the East African Court of Justice seeking redress for various breaches of the provisions of the Treaty for the Establishment of the East African Community ("the Treaty"), allegedly perpetrated by the Attorney General of the Republic of Uganda.
5. The Reference pertains to the walk-to-work protests undertaken by Ugandan Citizens in various cities of the Country following the results of the disputed 2011 General Elections.
6. It is alleged that at the time of the scheduling conference, the evidence relating to this Application was in the custody of third parties. It could have been anticipated to have that evidence brought up, yet it was not known then if the same would be availed by the third parties who were seized of it.
7. At the close of the pleadings, a Scheduling Conference was held before the trial Court on 23rd February, 2012, at which the parties agreed, *inter alia*, that all evidence would be adduced by way of Affidavit.
8. All along (including the time when the Reference came up for the Scheduling Conference), the 1st Respondent had been in active negotiations with the persons and institutions in whose custody the evidence was, with a view to availing that evidence

to the Applicant for use in the Reference. It was not until as recently as 25th June, 2012, that there was a break-through in the negotiations; and, hence, the necessity to make the Application to the First Instance Division to admit the additional evidence.

9. The evidence which had hitherto been cumbersome to obtain and required the surmounting of both diplomatic hurdles and corporate red-tape, has now become available for use in the Reference.
10. The proposed evidence is in electronic format. Such evidence and format were not expressly agreed upon at the Scheduling Conference; hence the Application for leave to adduce the same.
11. The electronic evidence contains live scenes of the walk-to-work processions, the subject matter of the Reference, as well as the demeanor of the parties (particularly so of the representatives of the 1st Respondent).
12. The 1st Respondent believes that this new electronic evidence is pivotal to the proper determination of the issues in controversy between the parties; as it would assist the Court to gain a clearer picture of the nature of the Treaty violations alleged in the Reference.
13. The said evidence, authored by the NTV Uganda, a media house with national coverage within the Republic of Uganda, was sought to be produced by Mr Julius Ssenkandwa, a Journalist from the NTV station. Annexed to the Application and marked JAM 1 was a certified translation and sworn statement by Ms Deborah Gasana, an Advocate based in Kampala, as to the contents of the video footage.
14. On 13th February, 2013, a panel of three Judges of the First Instance Division ruled that while Rule 46 of the Rules of Procedure of this Court prohibits the filing of any further documents after pleadings have closed, sub-rule 1 thereof, allows such filing to be done with the leave and at the discretion of the Court. Accordingly, the Court exercising its discretion granted the Applicant (now the 1st Respondent) leave to adduce the additional evidence in the form of documentation and also in electronic format. The Appellant, aggrieved by the Ruling of the First Instance Division, filed the instant Appeal.

**The Appellant's Submissions**

15. The Appellant contended that the trial Court improperly exercised its discretion in granting the 1st Respondent leave to adduce additional evidence. In support of that contention, the Appellant cited the case of *American Express International Banking vs. Atul [1990-1994] EA 10 (SCU)*, which elaborates the circumstances under which an appellate court can interfere with the exercise of the discretion of a trial Judge, namely:
    (i) where the Judge misdirects himself with regard to the principles governing the exercise of his discretion;
    (ii) where the Judge takes into account matters which he ought not to consider; or fails to take into account matters which he ought to consider;
    (iii) where the exercise of his discretion is plainly wrong -see: *The Abidin Daver [1984] All ER 470*.
16. Having cited the above circumstances, the Appellant contends that the Learned trial Judges:

(i) misdirected themselves with regard to the principles governing the exercise of their discretion in allowing new evidence;
(ii) took into account matters which they ought not to have taken into account, and failed to take into account matters which they ought to have taken into account; and
(iii) that, therefore, their decision was wrong.

17. The Appellant contended that the trial Judges improperly exercised their discretion by allowing the 1st Respondent to adduce new evidence without sufficient, reasonable or even credible cause, if at all. He asserted that the 1st Respondent did not state or provide sufficient, reasonable or even credible grounds for failing to file the additional evidence within the time-frame agreed at the Scheduling Conference. Instead, the 1st Respondent merely stated in paragraph 8 of his Affidavit that the evidence which hitherto had been cumbersome to obtain and had required the surmounting of diplomatic hurdles and corporate red tape, has now become available and could be used in the Reference. According to the Appellant, no elaboration whatsoever was ever made of the "diplomatic hurdles" nor of the "corporate red tape" alleged by the 1st Respondent.
18. The Appellant further challenged as vague the 1st Respondent's statement (in paragraph 7 of his affidavit) that he had "all along been in active negotiations with the persons/institutions in whose custody the evidence was… and that it was not until 25th June, 2012, that there was a breakthrough….". The Appellant contended that, indeed, the entire Application was vague and did not clearly state the grounds upon which it was based.
19. The Appellant argued that, James Aggrey Mwamu's affidavit failed to explain any reason for delay; and laid no basis on which the trial Court could have exercised its discretion consistent with the conditions in the case of *Ladd vs. Marshall (1954), CA 745*. Accordingly, there was no reason at all for the trial Judges to reach the conclusion that:
"they saw no reason to doubt the Applicant's submission that it was unable to obtain the new evidence, now sought to be adduced, before the Scheduling Conference, and the reasons as elsewhere set out above are not outlandish."
20. The Appellant contended that the Application should have failed:
(i) even on the first ground of *Ladd vs. Marshall (supra)* alone for failing to show why the evidence could not have been obtained with reasonable diligence for use at the trial; and
(ii) with regard to the principles set out in *American Express Int. Ltd Banking Corp vs. Atul (supra)* in accordance with which their discretion had to be exercised.
21. He argued that the 1st Respondent did not present to the Court the evidence they intended to adduce nor the proposed affidavit of Mr. Julius Ssenkandwa for consideration and assessment, to enable the exercise of the trial Judges' discretion in allowing or disallowing the evidence under the second and third tests of *Ladd vs. Marshall (supra)*. Without the affidavit of Mr Julius Ssenkandwa, the Court was left blind; unable to make any determination one way or the other. Furthermore, the evidence of Ms. Gasana was not what was intended to be produced before the Court. The evidence presented at the time of the Application must be the very evidence

adduced at the trial. Otherwise the entire enterprise is open to abuse and becomes self-defeating. In this regard, he cited the case of the *Attorney General vs Paul K. Ssemwogerere, Zachary Olum & Juliet Rainer Kafire* - Constitutional Application No. 2/2004: (Supreme Court of Uganda) outlining the principle that:
"the affidavit in support of an application to admit additional evidence should have, attached to it, proof of the evidence sought to be given."

22. The Appellant submitted that the trial Judges took into account a matter that they ought not to have taken into account, in as much as they treated Mr. Mwamu's affidavit as if it were a substitute of Mr. Julius Ssenkandwa. Conversely, they failed to take into account matters which they ought to have taken into account, namely the fact that the evidence sought to be adduced had not been presented for consideration. Therefore, there was no way the trial Judges could have properly exercised their discretion under the second and third tests of *Ladd vs. Marshall (supra)*.
23. Furthermore, the purported evidence was not new or fresh evidence at all. The electronic evidence shows the video material was derived from the internet video sharing website "You Tube". Therefore, it was not true that the evidence was unavailable at the time of conferencing, since the videos were readily available for downloading by the general public immediately.
24. For the above argument, the Appellant relied on the case of Charles Ian Walter Braithwaite and Chief Personnel Officer, Public Service Commission and Attorney General, No. 687/2007 (Supreme Court of Judicature, Barbados), in which the Judge having given due consideration to the tests of *Ladd vs. Marshal (supra)*, declined to exercise her discretion to admit new, fresh evidence after the matter had almost come to a close; on the grounds that the proposed evidence was not new evidence, but late evidence. Additionally, as the proposed evidence was not new evidence, the 1st Respondent deliberately deponed falsehoods. According to the (Ugandan) case of *Sirasi Bitaitana & 4 Others vs Emmanuel Kananura [1977] HCB 34* an affidavit which contains falsehoods naturally becomes suspect; and an application supported by a false affidavit is incompetent. Therefore, the trial Court should have struck out the affidavit of Mr. James Aggrey Mwamu for falsely deponing that he was submitting new evidence when the evidence was not new.
25. The Appellant submitted that since the Learned trial Judges were wrong in the exercise of their discretion, their decision (1) had the effect of altering the nature and character of the Reference; (2) allowed the 1st Respondent to re-plead its case; (3) rendered nugatory the entire Reference; (4) required submissions to be done afresh; (5) materially altered the agreed terms of the conferencing; (6) caused extreme prejudice to the Appellant; and (8) in effect, caused a mistrial. See Petition No. 5/2013 (Supreme Court of Kenya): *Raila Odinga vs. Independent Electoral and Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto*, in which the Supreme Court rejected the "further affidavit" (on consideration of time constraints) on the ground that the material in the affidavit would have the effect of changing the nature and character of the petition.
26. The Appellant argued that the Reference was supported by three Affidavits which narrated four incidents: one at Mulago roundabout, Kampala; one at Kasangati; and, two at Kireka, Kampala. However, the evidence now sought to be

adduced (as per the transcript and the electronic format videos), completely opens up the Reference to include hundreds of incidents.

27. The Appellant emphasized that even in *Ladd vs. Marshall (supra)* the evidence sought to be adduced was the specific evidence of a single witness, Mrs. Smith, regarding an instance of perjury. He further stated that other cases in the Commonwealth, and specifically in the East African region, cover instances where a specific document is sought to be produced - see *Karmali Tarmohamed & Another vs. IH Lakhani & Co. (1958) EA 567-574; Taylor vs Taylor (1944) 11 EACA 46; Corbertt vs Corbertt (1953) 2 AER 72; G.M. Combined Ltd vs. A.K. Detergents Ltd, Civil Appeal No. 7/1998 (Supreme Court, Uganda)*.
28. The Appellant contended that, without prejudice to his other arguments, even if consideration were to be given to admission of the electronic evidence, it should have been allowed to the extent only that the evidence shed light on the four incidents that had already been mentioned in the affidavits filed prior to conferencing.
29. The Ruling and orders of the trial Court had the effect of rendering nugatory the entire conferencing, proceedings, hearing, submissions and posture of the case. Accordingly, should the new evidence be allowed to stand, then the entire case shall have to be opened up afresh involving vast new pleadings, re-conferencing, re-hearing evidence and submissions. On this basis alone, the decision was wrong and the Application should have been dismissed. This has put the Appellant at a disadvantage. He had adduced evidence in rebuttal on the grounds produced in the original affidavit, when suddenly the scope was widened and the character and nature of the evidence changed. The sum total of all these effects and consequences caused a mistrial. The only remedy would, therefore, be for this Appellate Division to order a retrial.
30. The Appellant contended that in granting the Application and in allowing the 1st Respondent leave to adduce new evidence, the learned trial Judges have constituted a separate and independent cause of action, which is barred by limitation. In this regard, he submitted that:
    (i) the 1st Respondent was in violation of the limitation period of two months by more than one year and a half; and
    (ii) each incident cited and sought to be adduced as new evidence, represents and constitutes a separate cause of action in respect of which relief may be sought individually. However, such relief may only be sought in accordance with the law of limitation. see *Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No. 1/2011*: in which the Reference was struck out on the basis that it was filed out of time.
31. There must be an end to litigation. In the event that a new cause of action arises, the persons involved have the freedom to pursue their cause in Court in a separate action. No prejudice would be occasioned against the 1st Respondent if the alleged new evidence were rejected, since it is actionable by the persons involved.
32. In light of all the above grounds and arguments, the Appellant prayed this Honourable Court to order that:
    (i) the Learned trial Judges improperly exercised their discretion in allowing new/ additional evidence contrary to the principles and tests outlined in *Ladd vs. Marshall (supra)*;

(ii) the Appellant has made out its case in accordance with the principles in *America Express International Banking vs. Atul (supra)* and, therefore, the Ruling of the trial Court be set aside/overturned; and

(iii) the matter be remitted to the First Instance Division for conclusion on the merits.

**The Respondent's Case**

33. The 1st Respondent cited the principles that the trial Court took into account in arriving at their decision, namely:
*Ladd vs. Marshall (supra) and American Express International Banking vs. Atul (supra)* exercising its discretion to grant them leave to adduce the additional evidence.

34. He also cited the case of *Mbogo vs. Shah (1968) EA 10 (SCU) at p.96* where Newbold, P., stated the following principles, which an appellate court applies when deciding whether or not to interfere with the exercise of a trial Judge's discretion:
"… a court of appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice."

35. The 1st Respondent further cited the following case laws stipulating conditions precedent before a court can allow an application for additional evidence:
(i) the evidence was not available at the time of trial or could not be obtained with reasonable diligence - see *Karmali Tarmohamed & Another vs. I.H. Lakhani & Co [1958] EA 567) (supra)*;
(ii) the evidence must be credible and of such a nature that it would have an important influence on the results of the case - see *G.M. Combined (U) Ltd vs. A. K. Detergents (supra)*;
(iii) the evidence must be patently credible, though it need not be incontrovertible - see *G. M. Combined (U) Ltd. (supra)*.

36. Given the above Principles, it is the duty of Counsel to avail to the Court all necessary documentation, including that which he could not have obtained at the time of filing the Reference, to enable the Court to reach a just decision. It is also the duty of the Court to do justice to the parties, and to arrive at a just decision after reviewing all the evidence - *Aggarwal [1965] E.A*. The 1st Respondent argued that, the test was whether the Attorney General of Uganda suffered any injustice by the trial Judges' exercise of discretion. He cited *Shah vs. Allu [1974] 14 EACA 46*, where the Privy Council observed that:
"There has been injudicious exercise of discretion or an exercise of discretion at which no judge could reasonably have arrived where injustice has been done to the party complaining."

37. This Court should therefore, uphold the decision of the trial Judges as they took into account the above principles in arriving at their decision.

38. The 1st Respondent submitted that they are not aware of any format of disclosure expected by the Appellant and what details were expected and not indicated. He argued that NTV is a media house in Uganda which broadcast the incidents referred to, and which had the evidence that was sought to be adduced.

39. To the averment that the trial Court did not assess the evidence intended to be adduced, the 1st Respondent contended that it filed that evidence in Court and served it on the Appellant, giving him notice to adduce his evidence in rebuttal, which he did not do. In any event, the Appellant has not lost the chance to bring evidence in rebuttal, if he wishes to. Indeed, the new evidence was the basis upon which the trial Court made its decision for allowing the additional evidence.
40. The 1st Respondent brought to the attention of this Court the fact that Mr. Julius Ssenkandwa, the journalist who reported on the incidents, is within the jurisdiction of this honourable Court, and can be summoned for cross examination as to the content of the electronic evidence.
41. To the averment that the new evidence introduced new incidents and new causes of action in the Reference, the Respondent stated that the Reference referred to diverse dates within which the acts complained of took place in Uganda. Therefore, he was at liberty to adduce evidence from any corner of the diverse dates referred to in the Reference. The evidence does not introduce a new cause of action; neither does it alter the Reference. Rather, it is intended to prove those incidents.
42. To the averment that the trial court allowed additional evidence to be adduced when the case had effectively closed, the 1st Respondent argued that a case only closes after judgment has been pronounced by the court. Before judgment, the Court is at liberty to hear the parties or to require them to adduce further facts in proof of their allegations. The instant Reference was still pending the fixing of the date for the commencement of the hearing in accordance with Rule 53(3) of the Court Rules. The parties were to appear before the Court to take dates for the hearing. Accordingly, this matter was now only at a preliminary stage; and the new evidence could be tested at the next hearing of the case. In any event the Parties were allowed by law to seek further and better particulars.
43. The 1st Respondent invoked Rule 1(2) of this Court's Rules of Procedure on the inherent power of the Court to make "such orders as may be necessary for the ends of justice".
44. In light of all the above, the 1st Respondent prayed that this honourable Court:
    (i) dismisses this appeal;
    (ii) finds that the learned trial Judges properly exercised their discretion in allowing additional evidence to be adduced in accordance with the principles enunciated in *Ladd vs. Marshall (supra)*;
    (iii) order that the matter be remitted to the First Instance Division for hearing on the merits.

**Analysis**

Did the 1st Respondent provide sufficient, reasonable or even credible grounds for failing to file the evidence sought to be adduced within the trial framework agreed at the Scheduling Conference?

45. The Appellant contended that the 1st Respondent did not state or provide sufficient, reasonable or even credible grounds for failing to file the evidence sought to be adduced and that neither did they provide elaboration to the alleged "diplomatic hurdles and corporate red tape."

46. For his part, the 1st Respondent submitted that, it is the duty of counsel to avail the Court all necessary documentation, including that which he could not have obtained at the time of filing the reference, to enable the Court reach a just decision. Furthermore, they argued that they are not aware of any format of disclosure expected by the Appellant; nor of any details expected which are not indicated.
47. The Court has perused the 1st Respondent's Application and the supporting Affidavit of James Aggrey Mwamu. In that Application, the 1st Respondent stated that:
"he has all along including the time when the reference came up for the Scheduling Conference, been in active negotiations with the persons/institutions in whose custody the evidence is with a view to avail the same to the Applicant for use and it is not until recently 25th June, 2012 that there has been a breakthrough on the negotiations. The evidence which hitherto had been cumbersome to obtain and required the surmounting of diplomatic hurdles and corporate red-tape, has now become available and can be used in the Reference."
48. In his Affidavit, James Aggrey Mwamu stated, *inter alia*, that:
"to his knowledge at the time of the scheduling conference, the evidence to which this application relates was in the custody of third parties and that it could have been anticipated to have brought up the issue and yet it was not known if the same could have been available as it has now."
49. From the above observations, it is evident that, the 1st Respondent did provide grounds for his having failed to file the evidence sought within the time framework agreed at the Scheduling Conference. Whether those grounds were "sufficient, reasonable and credible" was a determination to be made within the discretion of the trial Judges. The Judges did indeed consider those grounds in detail. At the end of their consideration, they concluded that:
"They saw no reason to doubt the Applicant's submission that it was unable to obtain the new evidence it sought to adduce before the Scheduling Conference, and the reasons as elsewhere set out are not outlandish."
50. We find that, the Learned trial Judges did not, improperly exercise their discretion in granting the Application and in allowing the Applicant to adduce the new evidence. We also find that the Application was neither vague nor was it unclear in stating the grounds upon which it was based - as contended by the Appellant. Moreover, we disagree with the Appellant's contention that the Affidavit of James Aggrey Mwamu failed to explain the reason for the delay in filing. We conclude therefore, that a basis was laid on which the Learned trial Judges could exercise their discretion. It was on that basis that, the Learned trial Judges expressed their firm conclusion that:
"they saw no reason to doubt the Applicant's submission that it was unable to obtain the new evidence, and the reasons as elsewhere set out are not outlandish."
51. Indeed, the 1st Respondent gave an extensive elaboration of the 'diplomatic hurdles' and 'corporate red tape' during the hearing of the Notice of Motion on 16th January, 2012. This is clearly evidenced by the trial Court's Record of Proceedings in which the 1st Respondent states that, they had to employ diplomacy and go around red tape to obtain the evidence, and that the "red tape or… the diplomacy" was a question of how this evidence was obtained. They declined to disclose how they finally got the evidence. First, because it may have been through the wrong channels, not officially

sanctioned; but still yielding usable evidence. Second, because they did not wish to compromise the security of anyone involved in the release of that evidence.

52. From all the above explanations, we find that the Learned trial Judges did not misdirect themselves with regard to the principles in accordance with which they exercised their discretion. Their exercise of discretion was consistent with the standards laid out in *American Express International Ltd Banking Corp vs. Atul (supra)* and with the first test of *Ladd vs. Marshall (supra)*.

Did the 1st Respondent present to the Court the evidence they intended to adduce?

53. The Appellant argued that the 1st Respondent did not present to the Court the evidence they intended to adduce and, therefore, there was no way the Learned trial Judges could have assessed the evidence and thereby exercised their discretion properly in allowing or disallowing production of the evidence under the second and third tests of *Ladd vs. Marshall (supra)*.
54. Furthermore, the Appellant contented that since the proposed Affidavit of Mr. Julius Ssenkandwa was not produced in evidence, the Court was left blind and could not make any determination. He further argued that, the evidence of Ms. Gasana was not that which was intended to be produced before Court.
55. On the face of it, the Appellant's above contentions appear seductively attractive and eminently valid. On closer examination, however, there is more to it than meets the eye.
56. We need to be clear in our minds as to the process for admitting this new evidence. That process requires a two-pronged approach. First, the Court needs to address the application to admit the new evidence as a prima facie case. At that initial stage, the Court needs to satisfy itself of whether the evidence sought to be adduced is relevant and helpful (i.e. whether, if it is admitted, it will add value to the prosecution of the case).
57. Only after the evidence is admitted, will the Court then proceed to the next stage - namely, substantive consideration of the merits of that evidence. The Party adducing the new evidence will at that stage need to attest to the accuracy of that evidence; to its authenticity/genuineness and (especially if it is e-evidence), the assurance that it has not been interfered with whether the evidence can stand alone, or whether it needs corroboration; etc. The opposing Party, for his part, will at this stage do all in his power to oppose, rebut, counter and clarify these details of the new evidence. It is on the basis of these opposing views and submissions on the merits that the Court will adjudicate the evidentiary value of the new evidence. It is for this reason that the two distinct stages are to be distinguished.
58. In the instant Appeal, the matter in the trial Court had gone only through the first stage, when the Appellant, aggrieved by the Court's Ruling, brought the matter to appeal before us. The second stage will be attained only if we deny this appeal and remit the matter back to the First Instance Division for consideration of the new evidence on its merits.
59. In response to the Appellant's above contentions, the 1st Respondent countered that the evidence was filed in Court and was indeed duly served on the Appellant, giving him notice to adduce any counter evidence of his own. He submitted that, this was the evidence on the basis of which the trial Court arrived at its decision.

60. It is manifestly clear that the evidence in contention was filed in Court together with the Application on 3rd September, 2012, and the Court's Ruling on that Application was rendered on 13th February, 2013 - five months and two weeks after the filing. On this basis, we reject the Appellant's contention that the evidence was not filed in Court. We are satisfied that the Learned trial Judges had sufficient time and opportunity to assess the evidence and, thereby, properly exercised their discretion in reaching their decision.
61. Having read paragraph 12 of the affidavit of James Aggrey Mwamu, we find nothing in it indicating that the 1st Respondent had proposed to produce the affidavit for Mr. Julius Ssenkandwa.
62. We cannot, therefore, conclude that the 1st Respondent had failed to produce to the Court the evidence he intended to adduce. We are also of the view that, contrary to the Appellant's contention the Learned trial Judges did not read and make reference to the wrong Affidavit.
63. We would also agree with the 1st Respondent's suggestion that, since Mr. Julius Ssenkandwa, the journalist who reported the incidents, is within the jurisdiction of this honourable Court, he can be summoned for cross examination as to the contents of the new evidence.

    Did the Learned trial Judges improperly exercise their discretion by relying on false evidence?
64. The Appellant argued that the electronic evidence shows the video material was derived from the internet video sharing website "You Tube" and was available for download by the general public ever since the time of this Court's conferencing. He added that, since the proposed evidence was, therefore, not new evidence, the 1st Respondent deliberately deponed a falsehood. Therefore, the learned trial Judges improperly exercised their discretion by relying on false evidence.
65. It is our observation that electronic evidence and the transcription thereto which was adduced before the trial Court, was certified on 27th August, 2012 by Deborah Gasana, an advocate of the High Court of Uganda. The Affidavit of Mr. James Aggrey Mwamu further states that the evidence was acquired on 25th June, 2012 through prolonged negotiations with third Parties who were in custody of it. From these observations, we cannot make a finding (as the Appellant would have us do), that the 1st Respondent deponed a falsehood, or that the trial Judges improperly exercised their discretion by relying on evidence that was not new.

    Did the Ruling and Orders of the Learned Trial Judges have the effect of rendering nugatory the entire conferencing, proceedings, hearing, submissions, as well as the general posture of the case?
66. On this, we associate ourselves with the findings of the Learned trial Judges. They, as the Trial Court, were alive to the fact that the introduction of this new and extensive evidence was likely to lead to a reopening of some aspects of the pleadings. They found no prejudice at all to the Appellant if the evidence were admitted - in as much the Appellant would have the opportunity to challenge the content and veracity of that evidence by putting forward its own evidence to rebut and counter the new evidence. In its Ruling the Court clearly and categorically emphasized the fact that although the Parties may need to re-open their respective cases, that should not be a

bar in the circumstances of this case. They then, ruled that it was best to allow all the Parties an opportunity to tender all evidence that they deem relevant, to enable the Court make a fair and informed decision after having had an opportunity to examine all possible evidence on the issue(s) placed before it for determination.

67. In this regard, the trial Court was fortified by and very much alive to the import of Rule 46(1) of the EACJ Rules of Procedure. That Rule states that:
"After the close of the written proceedings, no further documents may be submitted to the court by either party except with leave of the Court".
Concerning the Rule, the Court observed that:
"the objectives of that exception to that Rule is to ensure that no evidence is shut out even after pleadings have closed. It does so by enabling the Court to exercise discretion whenever necessary to do so, to grant or withhold leave to submit documents after the close of proceedings. Moreover, the Court offers an opposing Party adequate opportunity to comment on and rebut the new evidence tendered by the other Party, and if necessary to file fresh evidence to contradict it."
Does the new evidence constitute separate and independent cause(s) of action barred by the law of limitation?
68. We are satisfied after perusing the Court Record and the Parties' written submissions, that the new evidence does not in any way constitute new causes of action. The evidence elaborates on the riots that erupted when the people engaged in walk-to-work protests against the high cost of fuel, transport and cost of living generally. In effect, the new evidence adduced only portrays different incidents of walk-to-work spanning the period between 11th and 28 April 2011 - all which are well documented in the substantive Reference (Reference No. 2 of 2011).
69. This was not a new cause of action, as asserted by the Appellant. Indeed, when looked at which strict scrutiny, the so-called "new evidence" was not all that "new" at all. In this connection, there is a distinction between new evidence in a trial and evidence adduced to elucidate, expound, or clarify evidence already on the Court's record.
70. In the instant Reference, the Court was already seized of the 1st Respondent's Affidavit listing at least four incidents of the walk-to-work protests (namely; Nateete, Kasangati and Kawempe), spanning various dates of a tense and explosive political season. The 1st Respondent then sought to adduce further evidence (of the electronic type), to add to the evidence already on the record. As it turned out, that further evidence merely added more incidents to the same walk-to-work protests - this time spanning the additional dates of 11th - 18th April, 2011.
71. In our considered view, what has transpired here is simply an increase in the number of incidents to the same transaction of walking-to-work – with the possibility of showing (live) more crowds, faces, demeanour and protestors; and the reaction of the security personnel, the nature and kind of weapons used, etc. In short, the new evidence would presumably add to the quality and quantity of the evidence already filed on the Court's record. To that extent, that was no different, in its effect, from adducing "more and better particulars" of the evidence already adduced and recorded in the prior proceedings -[see: *Rex vs. Yakobo s/o Mayenga, (1954) 12 EACA 60, quoted in M. Combined (U) Ltd (supra)*, in the Judgment of ODER, JSC. As has been said elsewhere, the "new" evidence", directing the elucidation of evidence already on

the record, merely "throws light upon the case"– The *King vs. Robinson (1917) 2 KBD 1098*.

72. In this regard, we are further fortified in our above holding, by the practice and experience of the International Court of Justice, whose interpretation and application of Article 52 of its Statute, and Article 56, para 1 of its Rules seem to suggest that: "each and every document not submitted during the written proceedings would constitute a 'new' document." [See *Zimmerman: A Commentary (supra), pp. 1131 – 1132]*.

**Administering Substantive Justice**

73. The EACJ is a Court of Justice. Its role is expressly and intrinsically stipulated in Article 23(1) of its founding Document: the EAC Treaty, as being:
"a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty."
74. Secondly, by its Rules of Procedure (Edition of April, 2013) the Court is specifically clothed with the inherent authority to do justice - beyond anything else. Rule 1(2) of those Rules provides that:
"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."
75. This is the first Rule, coming as it does literally upfront (i.e. ahead) of all the other Rules of this Court. This is both symbolic and symptomatic of the importance and value ascribed to the role of justice in the Court's firmament of functions. Like its Biblical counterpart (requiring believers to love), to do justice is the "first "and the "greatest" Commandment for this Court.
76. In the instant Appeal, the Appellant made a great deal out of the fact that at the Scheduling Conference before the trial Court, the Parties agreed to limit all evidence to Affidavit form, and not by other format (especially e-evidence) as now belaboured by the 1st Respondent. Additionally, the Appellant bemoaned the fact of admitting the new evidence "after the closure of the pleadings."
77. However, in our considered view, all this is to quibble over procedural technicalities of the case. The heart and substance of the case calls for consideration and attention beyond the technical. The Court needs to do a balancing act - oftentimes a delicate one – between the competing interests of procedural fairness versus substantive justice. The substantive justice of the case calls for a higher and nobler level of deliberation by this Court. Accordingly, even if the Conferencing "agreement" of the Parties had the rigid and strict effect that the Appellant ascribes to it that would not deter or preclude a Court of Justice, such as ours, from ordering otherwise¬¬ - if to do so is deemed "necessary for the ends of justice." In the instant Appeal, the trial Court needed to weigh the overall potential for value-added in admitting the proposed e-evidence, as against the Parties' earlier agreement to exclude all non-Affidavit evidence. The trial Court found that the need to admit the new evidence (in order to answer authoritatively and conclusively all the issues and questions in dispute), far outweighed the earlier agreement to exclude all other evidence adduced in other than Affidavit format.
78. In our view, to arrive at a just conclusion of the dispute, indeed outweighs by far

the perceived need to mechanically and robotically adhere to a particular technical format founded in a mere procedural "agreement" of the Parties emanating from a scheduling conference. In cases such as this, where the new evidence is critical to the determination of the case at hand, the Court's currency should invariably be tendered in substance over form. On this proposition, therefore, we agree entirely with the manner and extent to which their Lordships of the First Instance Division exercised their discretion.

79. Likewise, and for the same reasons of substantive justice, we agree with their Lordships decision to admit the e-evidence even after the closure of the proceedings in the underlying Reference. First, Rule 46(1) specifically allows such admission "with the leave of the Court". Their Lordships were more than persuaded to exercise their statutory discretion under Rule 46(1) to grant the requisite "leave" for admission of this e-evidence.
80. Secondly, in exercising their discretion as they did, their Lordships were advancing the cause of the first and greatest Commandment of this Court, namely: to do justice without undue regard to the technicalities of the law – a principle and philosophy which in the Appellant's own jurisdiction of Uganda, has been elevated to Constitutional status: under Article 126(2) of the Constitution of Uganda (1995)– see also Deputy Chief Justice Letitia Mukasa Kikonyogo's favourable upholding of that principle in the case of *Ebrahim Kassim vs. Habre International Ltd. Ref. No.16 of 1999, Supreme Court of Uganda (unreported); and Justice OdeR's holding in G. M. Combined (U) Ltd. (supra)* in support of the same principle. Interestingly, the dispute in the appeal in that Ugandan case (as in the instant appeal before us), involved the exercise of the lower Court's discretion in admitting additional evidence.
81. Elsewhere, in the East African Region, the above Constitutional position is the same: see Article 159(2)(d) of Kenya's Constitution (2010); and Article 107A (2) of Tanzania's Constitution.
82. The EACJ has no "Evidence Act" of its own. Moreover, being a supranational Court, it cannot use (let alone rely on) the Evidence Acts of its respective Partner States. It must rely on its Treaty; Protocols (if any, on this subject); its own Rules of Procedures (such as Rule 46); International Conventions of a general nature (such as the Vienna Convention on the Law of Treaties; as well as the practice and jurisprudence of similar International judicial tribunals.
83. The jurisprudence of the International Court of Justice (ICJ) on aspects of the above point is quite helpful. The relevant evidential rule of the ICJ on this point is Article 56 of that Court's Rules (which is virtually identical to our EACJ Court Rule 46). It provides in relevant parts, as follows:

"1. After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party or as provided in paragraph 2 of this Article. The party desiring to produce a new document shall file the original … with the Registry, which shall be responsible for communicating it to the other party and shall inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.

2. In the absence of consent of the Court, after hearing the parties may, if it considers

the document necessary, authorize its production.

3. If a new document is produced under paragraph 1 or paragraph 2 of this Article, the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.
4. No reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Article 43 of the Statute or this Article, unless the document is part of a publication readily available.
5. ……."

84. The ICJ has over a long period of time decided many cases involving the application of Article 56 of its Rules. Notable among the earliest such cases was the *Nottebohm Case* (Second Phase) ICJ Reports [1955], pp.6,9, 25 - in which, the Court allowed Guatemala to file a number of new documents - including some not consented to by Liechtenstein. However, the Court reserved Liechtenstein the right to comment on the new documents and to file further documents in support of its comments, after having heard Guatemala's contentions. The Court was satisfied that a reasonable explanation had been furnished from the belated submission of the documents, and on that basis allowed their production – see *Nottebohm Case*, II Pleadings 35, 44-64.
85. The predecessor Court to the ICJ (the PCIJ), for its part, took an even more lenient, non-formalist approach - namely:
"The Court thought it preferable not to allow the objection as to the admissibility [of the new documents]...because the settlement of an International dispute could not be made to depend mainly on a point of procedure."- see *The Free Zones Case*, *Eighth Annual Report, PCIJ, Series E, No.8, pp. 267-268*.
86. In 1953, the Court issued a strict Practice Direction (ICJ Yearbook 1953-1954, p.104) to the effect that submission of new documents after the conclusion of the written proceedings is permissible only in exceptional circumstances and in conformity with the conditions laid down in the Rules. In 2002, the Court went even further by adopting Practice Direction IX (available at http://www.icj.org.), which was even more strict than the earlier Practice Direction of 1953.
87. Nonetheless, the Court has continued its flexible attitude in exercising its discretion toward accepting new documents/evidence. Among the numerous cases in which the Court has so acted in more recent times, are the following three notable ones, which particularly, stand out because of their relevance to the instant Appeal before us:
    - *Kasikili/Sedudu Island Case ICJ Reports [1999-II], pp. 1045, 1051 (para.7)* - in which each party produced new documents with the consent of the other. In addition, Namibia availed itself of Article 56, para.3 of the Rules, and submitted comments on some of the documents produced by Botswana.
    - *La Grand Case, ICJ Reports [2001],pp. 466, 470, 471 (para 6, 9)* - in which the USA objected to Germany's submission of certain documents. The Court decided to authorize their production without hearing the matter. However, since Germany gave notice of such production at a very late stage, the Court gave the USA the opportunity to submit its new documents together with any comments, both at the hearing, as well as later in writing after their closure.
    - *Armed Activities on the Territory of the Congo (Uganda) CR 2005/2 (11 April*

*2005), p.9* - in which both parties having exchanged certain documents (in October, 2003), the Court decided that those documents did not form part of the case file, and could not, therefore, be referred to in oral arguments pursuant to Article 56(4) of the Rules. However, when both parties expressed the desire to produce new documents – and neither party objected to the other – their respective Counsels were informed that they would be free to refer to the new documents during the oral proceedings.

88. In all the above jurisprudence, it is quite clear that the ICJ practice has been flexible and accommodating to the issue of admitting into evidence new documents, well beyond the prescribed deadline for their production. In particular, evidence submitted out of time is admissible in two distinct situations:
    (i) if the other party consents; or
    (ii) if the Court in the absence of such consent, decides not to exercise its discretionary power to reject it.
89. The ICJ has consistently and quite frequently, done so, notwithstanding its expressed reason for having prescribed Article 56 of the Rules in the first place - namely "not to acquiesce in avoidable delays" (see Shabtia Rosenne: *The Law And Practice of The International Court, 1920-2005 Fourth Edition, Vol.III, p.1267*, (Martinus Nijhoff Publishers: Leiden/Boston).
90. Indeed, Article 56, para 4 of the ICJ Rules (quoted above), clarifies that after the closure of the written proceedings, a party can introduce documents that are "part of a publication readily available." Thus, parties can always refer to published materials that are in the public domain, even if they have not introduced that material during the written proceedings. The explanation for this being that:
    "...where a document is readily available, neither the party nor the Court will be surprised to see it referred to. Hence, Libya, at the provisional measures stage of the Lockerbie Cases, could submit a considerable amount of newspaper rreports after the close of the written proceedings."- see Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm (Editors): *The Statute of the International Court of Justice – A Commentary, Oxford Commentaries on International Law (Oxford University Press, 2006), p.1132*; - see also *Rosenne: Law And Practice of the ICJ (supra)*.

**Conclusion**

91. In our opinion and in light of all the above:
    (a) The Appellant has failed to demonstrate that the Learned trial Judges misdirected themselves in granting leave to the 1st Respondent to adduce the new evidence. We find that the trial Judges did act within their discretion and in accordance with the Law and the established principles and standards governing the exercise of judicial discretion.
    (b) No prejudice will be occasioned the Appellant from the admission of the new evidence in as much as a reasonable opportunity will be provided to him to respond to and to rebut the new evidence.
    (c) The Appeal is dismissed. The matter is remitted to the First Instance Division for determination of the Reference on the merits. The costs of this Appeal shall be in the cause.

It is so ordered.

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East African Court of Justice - Appellate Division
Appeal No. 2 of 2013

Appeal from the Judgment of the First Instance Division: Justice Busingye, PJ; Lady Justice Arach-Amoko, DPJ;

Justice Mkwawa, Justice Butasi and Justice Lenaola, in Reference No. 1 of 2012 dated 17th May 2013

**Timothy Alvin Kahoho And The Secretary General of the East African Community**

Before: Liboire Nkurunziza, V P; James Ogoola J A, & Aaron Ringera J A
November 28, 2014

*Areas of co-operation in EAC – Delegation of authority - Damages - Judicial irregularities- Summit directives to Secretariat - The proposed Protocol on Immunities and Privileges - The requirements of good Faith- Whether the First Instance Division failed to consider the the Applicant's arguments.*

*Articles: 35 A, 73,138, 151 of the EAC Treaty - Rule 43 of the EACJ's Rules of Procedure, 2013.*

The Applicant Appellant, a Tanzanian journalist, filed Reference No 1of 2012 averring *inter alia* that: Summit had contravened Articles 73 and 138 of the Treaty when it directed the conclusion of the Protocol on Immunities and Privileges because these were not areas of co-operation to which a Protocol could be concluded within the meaning of Article 151 of the Treaty; And that by mandating the Secretariat to propose an Action Plan and Draft Model for the Political Federation , Summit would be circumventing that process as they should have directed the Council to undertake the process. This circumvention would violate Article 123 (6) of the Treaty. When summit rectified the error during its 14th meeting, by directing Council to consider the process, the Applicant contended that the even then, a violation of Article 123 (6) continued. The Applicant also deponed that the process towards a Political Federation cannot be a preserve of the Council or Summit but must involve all citizens of the Partner States.

The Appellant sought orders quashing the judgment of the First Instance Division, dated 17th May 2013; and an award of damages.

**Held:**

1) Both the spirit and letter of the Treaty permits the Partner States to forge co-operation of any kind, in any field, and on any matter of their choice as long as that co-operation is in the furtherance or promotion of the objectives of the Community as set out in Article 5 of the Treaty. The proposed Protocol for the Partner States' recognition of the Immunities and Privileges of the Community (and its organs, institutions and

employees) promotes the objectives of the Community and its adoption by Summit was, an enhancement of the objectives and purposes of the Treaty. It creates a common platform to enable Partner States to coherently and uniformly implement Articles 73, 138 and 151 of the Treaty.

2) The Summit is the driver of the engine of the locomotive of East African Integration and Political Federation. The Summit could not and was not delegating its directives to anybody. It was transmitting a set of its decisions to the Secretariat for the latter's implementation as per Articles 11 (1) and Article 11(5).
   Article 123 must be read with Articles 11, 14 and 71 of the Treaty. These Articles are complementary and lead to the conclusion that even if the Appellant's contention that the process of Political Federation was initiated by the 13th Summit in Bujumbura (which the Court did not accept), the Summit did not exceed its authority.
3) Failure to interpret the Treaty, or erroneous interpretation did not constitute a procedural irregularity as an irregularity is a procedural shortcoming; not a substantive error of interpretation of the law.
4) Applying the principles of good faith, the First Instance Division committed no impropriety in their interpretation of the provisions of the EAC Treaty.
5) There was no merit in the Appellant's submissions that the First Instance Division failed to consider all his arguments. The Appeal was therefore dismissed.

## Judgment

**Introduction**

1. This appeal is the culmination of a spectacular odyssey by a public-spirited citizen of the East African Community who, single-handedly, dedicated himself, his time and his personal resources to the elusive pursuit of justice for all. Against all odds, the Appellant, Mr. Timothy Kahoho, a single individual in this Community of Five Partner States and more than 150 Million People, set out to challenge the Directives of the Summit of the Five Heads of State concerning the route and the direction through which the desired East African Political Federation should travel; the pace at which that travel should proceed; and the nature and depth of involvement which the collective Citizenry of East Africa should be afforded in forging the enterprise of that Political Federation.
2. In the Appellant's own words: "This is a landmark suit whereby an ordinary citizen of an expected East African Federation is challenging decisions of the Summit [of Five Heads of State]" on the process of attaining that Federation. In essence, the case raises the fundamental issues of the separation of powers between the different Organs of the East African Community; the appropriate margin of appreciation to be accorded to the Summit's exercise of its sovereign power to steward the Community to achieve its ultimate objectives (particularly so the establishment of a Political Federation); and the role of the People of East Africa in forging the destiny of their Community.
3. It was for these reasons that Mr. Kahoho (now "the Appellant"), was inspired to file a Reference in this Court, to contest the Summit's directives to the Secretariat of the Community for studies on the envisaged Federation. He lost the skirmish. Dissatisfied with the judgment of the First Instance Division of this Court, Mr. Kahoho filed this

Appeal in this Appellate Division:

1) seeking to quash the decision and judgment of the First Instance Division, dated 17th May 2013; and
2) praying for an award of appropriate reliefs, including personal damages.

4. In his Memorandum of Appeal, the Appellant set out a litany of his grounds of appeal – which, for reasons of brevity and clarity, may be summarized as follows – namely, that the First Instance Division erred:
   1) in holding that decisions of the 13th EAC Summit held in Bujumbura, Burundi, did not breach Articles 73, 138 and 151 of the EAC Treaty;
   2) in determining the first issue (above) without taking into account the Appellant's argument that Articles 73 and 138 of the EAC Treaty were not "areas of co-operation" envisaged under Article 151 of that Treaty;
   3) in delivering its verdict without considering the Appellant's submission that the Respondent failed to address paragraph 11 of the Reference;
   4) in holding that directives of the 13th EAC Summit in Bujumbura did not infringe Articles 6, 7 and 123 (6) of the EAC Treaty (despite Article 11 (5) of the Treaty which does not empower the Summit to give directives to the EAC Secretariat);
   5) in finding for the Respondent without considering those of the Appellant's pleadings which the Respondent, in their pleadings, did not specifically deny;
   6) in committing judicial irregularities through deliberating upon and determining the third issue by reference to a book entitled "The State of East Africa: Report, 2006" in respect of the 13th Summit's act of mandating the Secretariat to perform the functions set out in paragraph 10 (iii) of that Summit's Communiqué dated 30th November, 2011;
   7) in holding that no error was rectified by the 14th EAC Summit when it assigned the impugned directives to the Partner States and directed the Council of Ministers to report back to the 15th EAC Summit;
   8) in interpreting Article 131 of the EAC Treaty too broadly, to widen the scope of the Partner States' areas of co-operation; and
   9) in exceeding its judicial powers and basing its decision on wrong premises.

**Background**

5. The brief but succinct background to this Appeal is set out in paragraph 2 of the Judgment dated 17th May 2013 of the First Instance Division in the underlying Reference to this Appeal. That paragraph recounts the factual background to the Reference, as follows:

   That on 30th November, 2011, the EAC Summit issued, its Communiqué after its meeting in Bujumbura, Burundi (the "Bujumbura Communiqué").

   That the Communiqué:

   i) Approved the Protocol on Immunities and Privileges for the East African Community; including its organs and institutions;
   ii) Considered and Adopted the Report of the Team of Experts on fears, concerns, and challenges on the Political Federation;
   iii) Noted the Recommendations of the Team of Experts for addressing those fears, concerns and challenges;

iv) in its Paragraph 10, mandated the Secretariat to:-
   I. Produce a Road map for establishing and strengthening the institutions identified by the Team of Experts as critical to the functioning of the Customs Union, the Common Market, and the Monetary Union.
   II. Formulate an action plan for operationalizing the other recommendations in the Report of the Team of Experts.
   III. Propose an Action Plan, and a Draft Model of the structure of the East African Federation for consideration by the Summit at its 14th Ordinary Meeting.

6. In its Judgment, the First Instance Division considered and rejected all the five issues which were agreed for trial. Those issues were as follows:
   1) Whether the decision of the 13th Summit approving the Protocol on Immunities and Privileges contravened Articles 73, 138 and 151 of the Treaty?
   2) Whether the decision of the 13th Summit to mandate the Secretariat to undertake the functions stated in paragraph 10 of the Bujumbura Communiqué of 30th November 2011, contravened Articles 6, 7 and 123 (6) of the Treaty?
   3) Whether the process towards the establishment of a Political Federation of the East African Partner States is an exclusive preserve of the Council of Ministers, to which the Secretariat cannot contribute?
   4) Whether the conclusion of Protocols is permissible only where the East African Community Treaty specifically provides for 'areas of co-operation'?
   5) Whether the Applicant (now "Appellant") was entitled to the reliefs sought?
7. Having lost his case on every issue, the Applicant in the Reference appealed to this Division of the Court against the whole Judgment of the First Instance Division, seeking the following remedies:
   1) A declaration that the 13th Summit, in its Bujumbura Communiqué, grossly breached the Treaty; in particular Articles 6, 7 and 123 (6) of the Treaty.
   2) A declaration that the same Summit infringed the provisions of Articles 73 and 138 of the Treaty.
   3) An order requiring all subsequent Summits to abide by the provisions of Article 123 (6) of the Treaty.
   4) A declaration that all actions that the Secretariat may have implemented pursuant to the impugned Directives of the 13th Summit are null and void.
8. At the Scheduling Conference of the appeal before this Appellate Division, the Parties consolidated the above grounds into the following four issues, namely:
   1) Whether the First Instance Division erred in deciding that the directives of the 13th Summit were consistent with Articles 6, 7, 11, 73, 123(6), 131, 138 and 151 of the Treaty?
   2) Whether the First Instance Division, in addressing the question of the impugned directives issued by the 13th Summit to the Secretariat, committed any judicial irregularities?
   3) Whether the First Instance Division, in reaching its Judgment, failed to consider the arguments of the Applicant (now "Appellant") in paragraphs 7, 8, 9 and 11 of his Reference?
   4) Whether the Appellant is entitled to the remedies sought?

**The Appellant's Case**

9. In the main, the Appellant in his written and oral submissions on the above agreed issues, adopted wholesale the submissions, arguments and contentions that he had previously made before the First Instance Division. However, he did highlight a number of areas specific to this appeal – for instance, regarding the exercise of discretion by the Learned Judges of the First Instance Division.

**The Respondent's Response**

10. The Respondent denied all the contentions raised by the Appellant. In particular, the Respondent maintained that the First Instance Division:
    1) correctly decided that the directives of the 13th Summit were consistent with Articles 6, 7, 11, 73, 123 (6), 131, 138 and 151 of the Treaty;
    2) did not commit any judicial irregularities when considering the above question of the directives issued by the 13th Summit to the Secretariat; and
    3) considered all the arguments adduced in the Applicant's pleadings (including the arguments in paragraphs 7, 8, 9 and 11 of the Reference).

**Analysis of the Issues**

11. We analyse below the four Agreed Issues:
    Issue No. 1: Whether the First Instance Division wrongly decided that the Directives of the 13th Summit were consistent with Articles 6, 7, 11, 73, 123(6), 131, 138 and 151 of the Treaty?
12. Wrapped under one common cloak in this Issue, were two distinct limbs of the same Issue – namely: 1) Whether the Summit's adoption of a Protocol on Immunities and Privileges was consistent with Articles 73 and 138 of the Treaty? and 2) Whether the Directives the Summit issued to the Secretariat to undertake the Political Federation functions listed in paragraph 10 of that Summit's Bujumbura Communiqué, were in breach of Articles 6, 7, 11 and 123 (6) of the Treaty?
13. As regards the first limb of the Issue of that Summit's Communiqué of 30th November, 2011 (concerning the adoption of the Protocol on Immunities and Privileges), the Appellant maintained his earlier contentions, namely that the Summit lacked authority to adopt that draft Protocol, as the contents and subject matter of the Protocol were not "*areas of co-operation*" within the meaning of Articles 73, 138 and 151 of the Treaty. To the extent that the Appellant merely repeated before this Court, the same submissions that he had made before the First Instance Division, there was an element of confusion as to whether he was now seeking a "review", a "revision" or an "appeal".
14. Be that as it may, we nonetheless decided to treat the matter as being an appeal. We did so for two reasons. First, the Appellant was throughout this litigation an unrepresented litigant, whom the Court – especially a Court of Justice, such as ours – should not overly penalize for not knowing the intricacies and technicalities of the law's demands. Secondly, the point raised by the Appellant was an important one, requiring close scrutiny of the nature and architecture of the EAC Treaty.
15. The Judgment of the First Instance Division dealt with the sub-issue of the Immunities Protocol at two levels. First, the Learned Judges reasoned that the

Protocol, in its language, structure and content was in line with the harmonization, function, development and furtherance of the objectives of the Community and the implementation of the provisions of the Treaty…as can be discerned from a good faith reading of Articles 73, 131 and 138 of the Treaty (see paragraphs 61-67 of this Judgment).

16. Second, they concluded that the required "*areas of co-operation*" are not confined to those specifically listed or enumerated in the Treaty. Article 138 can create an area of co-operation around which the Protocol can properly be concluded under Article 151 of the Treaty. Indeed, it is for this purpose that Article 131 was enacted to reduce frequent amendments of the Treaty that would necessarily be required whenever a new area of co-operation arose and which could not otherwise be managed outside the existing provisions of the Treaty.
17. Upon careful reflection, we cannot fault the learned Judges' above reasoning and holding, concerning this sub-issue of the Protocol on Immunities and Privileges. We agree with their Lordships' position. We would, however, add one or two other reasons why the Summit's adoption of that Protocol did not contravene the Treaty. For one, Article 1 of the Treaty defines the concept of co-operation in terms that reinforce (rather than detract from) the propriety of the impugned Protocol. That Article defines "co-operation" as follows:- "co-operation includes the undertaking by the Partner States in common, jointly or in concert, of activities undertaken in furtherance of the objectives of the Community as provided for under this Treaty or under any contract or agreement made thereunder or in relation to the objectives of the Community;"
18. It is quite evident from the above definition that co-operation between the Partner States is neither confined nor restricted exclusively to the areas of co-operation that are specifically enumerated in the present provisions of the Treaty. Pursuant to Article 1 of the Treaty, the Partner States may – whether "in common", or "jointly", or "in concert" – undertake any co-operative activity that they set their sovereign mind to. Such activity may be in any field of endeavor – whether within or outside the vast and varied fields of co-operation that are specifically referred to in the Treaty. 19.In this regard, the terrain and the scope of the "areas of co-operation" specifically enumerated in the Treaty is enormous, nay, colossal – ranging, as they do, from co-operation in Trade Liberalization and Development (Chapter 11); to co-operation in Investment and Industrial Development (Chapter 12); to co-operation in Standardization, Quality Assurance, Metrology and Testing (Chapter 13); Monetary and Financial Co-operation (Chapter 14); Co-operation in Infrastructure and Services (Chapter 15); Co-operation in Development of Human Resources, Science and Technology (Chapter 16); Free Movement of Persons, Labour, Services, Right of Establishment and Residence (Chapter 17); Agriculture and Food Security (Chapter 18); Environment and Natural Resources Management (Chapter 19); Tourism and Wildlife Management (Chapter 20); Health, Social and Cultural Activities (Chapter 21); Enhancing the Role of Women in Socio-Economic Development (Chapter 22); Co-operation in Political Matters (Chapter 23); Legal and Judicial Affairs (Chapter 24); the Private Sector and the Civil Society (Chapter 25); Relations with Other Regional and International Organisations and Development Partners (Chapter 26)

and Co-operation in Other Fields(Chapter 27).

19. The above list is, to say the least, expansive, extensive and exhaustive, if not exhausting. In our view, the sheer vastness of the scale and breadth of these far-flung areas of co-operation is trite testimony to the intent of the framers of the Treaty to prescribe co-operation that is all-encompassing and all-consuming. From it, it is difficult to see or imagine any other "areas of co-operation" that would not fit in the many diverse and broad areas listed in the above Chapters 11 to 26 of the Treaty.
20. But just in case any particular field or sector of co-operation was not catered for under Chapters 11 through 26, the framers of the Treaty left nothing to chance. They specifically included a residual Chapter – of only one Article: Article 131 – to capture "Co-operation in [all] Other Fields."

    Given all the above, we find that:

    1) the areas of co-operation expressly listed as such in the Treaty, are both numerous enough and sufficiently broad to accommodate virtually any area of co-operative endeavor that the Partner States may choose to entertain; and
    2) there is a residual, catch-all chapter in the Treaty for any other co-operation outside the fields that are expressly enumerated in Chapters 11 through 26 of the Treaty. Under this residual chapter, Partner States may seek to co-operate in any field whatsoever that they may choose – as long as such co-operation meets the critical condition set out in Article 1 (definition) of the Treaty: namely, that the co-operation is "in furtherance of the objectives of the Community…"; as well as the core requirement in Article 151 (1) that the co-operation must spell out the "objectives and scope of, and institutional mechanisms for such co-operation and integration".
21. The above references in both Article 1(1) and Article 151 (1) of the Treaty to the furtherance and promotion of "the objectives of the Community", are a recurrent theme throughout all the relevant provisions of the Treaty on co-operation. That theme is a pivotal pre-requisite whenever and wherever co-operation between the Partner States is envisaged. It is repeated over and over again in Article 1(1), 74, 79, 82(1), 89, 102(1), 115(1),117, 123(1) and (4), 124(1), 126(1), 130(3) and 151(1) of the Treaty.
22. From this categorical emphasis, it is quite evident, in our view, that both the spirit and letter of the Treaty (read as a whole), is to permit the Partner States to forge co-operation of any kind, in any field, and on any matter of their choice – whether within or outside the ambit of the enumerated "areas of co-operation" – as long as that co-operation is in the furtherance or promotion of the objectives of the Community as set out in Article 5 of the Treaty.
23. Accordingly, in any given co-operative endeavor between the Partner States, the question to ask is not: whether the endeavor falls within the "areas of co-operation" specifically enumerated in the various provisions of the Treaty. The question, rather, is: whether the particular area of endeavor is in the furtherance or promotion of the objectives of the Treaty, set out in Article 5 thereof.
24. In the instant case, there can be no doubt whatsoever, but that the proposed Protocol for the Partner States' recognition of the Immunities and Privileges of the Community (and its organs, institutions and employees) would, indeed, promote the objectives

of the Community. Therefore, far from being an infringement of the Treaty, the Summit's adoption of the Protocol was, indeed, an enhancement of the objectives and purposes of the Treaty.

25. In addition to the above express Chapters of the Treaty on co-operation, there are other provisions under which Partner States may undertake other co-operative endeavors of their own choice. Two examples of such provisions will suffice. The first, is Article 123 (4) which mandates Partner States to pursue a common foreign and security policy through co-operation in any matter of foreign or security interest, and by co-ordinated international action of the Partner States.
26. The second example is Article 138, under which Partner States may co-operate in pursuit of implementing, harmonizing, coordinating or streamlining their joint positions on matters of the Status of Immunities and Privileges to be accorded to the East African Community and its officers.
27. The Protocol on Immunities and Privileges for the East African Community and its Organs and Institutions, is meant to create a common platform to enable Partner States to coherently and uniformly implement Articles 73 and 138 of the Treaty, read together with Article 151.

    Principally, the Protocol seeks to establish a common framework to guide the status of immunities and privileges in the various Host Agreements hitherto signed piecemeal by the Secretary General and the Governments of Partner States pursuant to Article 138(2).

    In this regard, we find that Articles 73 and 138 of the Treaty do not prohibit the conclusion of the proposed Protocol on Immunities and Privileges -- which is crucial to inform the Community's employment terms and conditions, amongst other objectives. Moreover, the Protocol is intended to provide standard guidelines that uniformly cater for the protection and interests of the Community and of its Organs, Institutions, and Employees – on matters of the immunities and privileges to be granted; and, thereby, to facilitate the various beneficiaries in the execution of their Treaty mandate.
28. From all this, it is plainly evident that in adopting the proposed Protocol on Immunities and Privileges, the 13th Summit committed no breach of any Treaty provision at all, and, most especially Articles 73 and 138. On the contrary, the Summit had a formidable bulwark of Treaty provisions to stand on.
29. Accordingly, the Appellant fails on the first sub-issue of Issue No.1.
30. The second sub-issue of Issue No.1 was this: Whether the Directives issued by the 13th Summit to the Secretariat to undertake the Political Federation functions under paragraph 10 of that Summit's Communiqué of 30th November 2011, were in breach of Articles 6, 7, and 123 (6) of the Treaty?
31. The Appellant's bone of contention on this sub-issue (reduced to its barest skeletal minimum), was simply this: the Summit had no authority in the Treaty to direct the Secretariat to undertake these Political Federation functions. In the Appellant's view, the Summit could, and should, have given those directives either to (i) a member of the Summit, or to (ii) the Council of Ministers, or to (iii) the Secretary General under Article 11(5) – but not the Secretariat.
32. Delegation of Authority: Article 11(5) Vs Giving Directives: Article 11(1).

Article 11 of the Treaty addresses two quite separate and distinct notions. First, the notion of the Summit's authority to issue directives for the performance of particular operations of the Community; and, second, the notion of the Summit's authority to delegate its authority to named organs or persons in the Community.

33. The first notion (issuing directives) is contained in Article 11 (1). Under it, the Summit has authority to:
"1…give general directions and impetus as to the development and achievement of the objectives of the Community."
Most important in the above-quoted language, Article 11 (1) is expressed as a general principle.
34. The Summit is not restricted, or in any way fettered, as to how, when, and to whom it is to give its directives. Least of all, the sub-Article does not constrain, restrict or draw any boundaries around the kind of organs, institutions, officers or other persons to whom the Summit may address its directives. It is not even stated whether such recipients of the Summit's directives are limited only to persons "within" the Community – or whether even those "outside" the Community are envisaged.
35. In other words, the Summit is totally free to choose to whom it may address its directives – so long as those directives concern "the development and achievement of the objectives of the Community." Article 11(9) makes this function of the Summit non-delegable.
36. The position with regard to the second notion (.i.e. delegation of authority), however, is vastly different. It is contained in Article 11(5) of the Treaty. Unlike its counterpart (Article 11(1) discussed above), this sub-Article (5) deals with the more substantive matter of transferring authority from one Organ of the Community (the Summit), to other organs and persons.
37. First, and foremost, the nature and character of a formal delegation of authority is totally different from the administrative act of issuing directives to somebody to carry out a task or a function. Delegation involves transfer of authority from one person (the delegator) to another (the delegatee). In this connection, *Black's Law Dictionary, 8th Edition* at p.459 defines delegation as:
"the act of entrusting another with authority or empowering another to act as an agent or representative."
38. From the effective time of the delegation, the delegatee/agent becomes clothed with the scope of authority so delegated. The delegate enjoys the authority formerly enjoyed by the delegator. Secondly, in accordance with the terms of Article 11(5), the delegation of the Summit's authority is strictly circumscribed as to whom the power may be delegated – namely, a member of the Summit, the Council of Ministers, or the Secretary General. No other potential delegatee's are allowed (e.g. the Secretariat, the East African Court of Justice, the East African Legislative Assembly, etc.) – let alone those outside the family of the East African Community.
39. Moreover, the scope of what authority of the Summit is delegable under Article 11(5), is equally restricted – by Article 11(9), which prohibits the delegation of the following powers of the Summit:
"(a) the giving of general directions and impetus;
(b) the appointment of Judges of the East African Court of Justice

(c) the admission of new Members and granting of Observer Status to foreign countries; and
(d) assent to Bills."

40. Paragraph 10 of the Bujumbura Communiqué did not in any way constitute a delegation (i.e. transfer) of any of the powers or authority of the Summit under the Treaty. Conversely, the Secretariat did not, thereby, assume the exercise of any of the powers or authority of the Summit.
All that the Summit transmitted and the Secretariat received were a set of directives instructing the Secretariat to perform certain activities and preparatory assignments on the question of Political Federation. At the conclusion of the exercise, the Secretariat was required to make "proposals and recommendations" for the consideration of the next Summit. Thus, in whichever way, and from whatever angle the matter is looked at, the issuance of the Summit's directives was not an act of delegation of power or authority within the meaning of Article 11(5) of the Treaty.
41. Therefore, in view of the separate and distinct functions of Article 11 (1), on the one hand; and Article 11(5) on the other, the Appellant's complaint concerning the organ to whom the directives of the Summit in paragraph 10 of the Bujumbura Communiqué was addressed, was misconceived. It is quite evident from the above analysis, that the Summit could not and was not "delegating" its directives to anybody. Rather, it was transmitting a set of its decisions to the Secretariat for the latter's implementation. Clearly, this was appropriate, and unimpeachable - in as much as the Secretariat is, indeed, the executive organ of the Community, with express authority and responsibility for the "implementation of the decisions of the Summit" - see Article 71(1) (l).
42. The above should put to rest the Appellant's misconceived contention that the Summit should have addressed its directives to the Secretary General (not the Secretariat).
43. In any event and given the above analysis, it matters not whether the Summit addresses its directives to the Secretariat or to the Secretary General. The two are but two faces of the same coin. The Secretary General is the Head of the Secretariat: Article 67(3). He or she is the very embodiment of the Community which, as a corporate body, is represented by the Secretary General: [(Article 4(3).
44. The Secretariat (its Officers, Staff and Employees), exists to assist its Head, the Secretary General, to execute his or her mandate under the Treaty. Indeed, Article 71(2) is emphatic—the Secretary General "shall where he or she thinks appropriate, act on behalf of the Secretariat." In our view, therefore, it matters not whether the impugned directives of the 13th Summit were addressed to the Secretariat or to the Secretary General. To make a contention about this is to make a mountain out of a mole hill. It is to brew a storm and to stir a tsunami out of a plain tea cup.
45. Regarding the Appellant's contention that the initiation of the process of Political Federation can only be done by the Summit directing the Council of Ministers under Article 123(6), we agree with the judgment of the First Instance Division which (after a very comprehensive review of the facts and all the materials before it), found the contention to be misguided because:
"the initiation of the process of Political Integration and eventual Political Federation was not made at the 13th Summit, but much earlier [and] therefore, the mandate

given to the Secretariat was in furtherance of a process that had been in place long before the Bujumbura Communiqué…..

In fact in its Report dated 26th November 2004 presented to the Summit, the Committee on Fast Tracking East African Federation, in its transmittal letter to the Heads of State, acknowledged that the Summit in fact initiated the process in its Communiqué of the 28th August 2004 and not later. These facts cannot be contested because they have been well documented for posterity". See paragraphs 43, 52 and 53 of the judgment of the First Instance Division.

46. Additionally, as discussed elsewhere in this Judgment, we find the contention of the Appellant to be inconsistent with the well-established principles of Treaty interpretation to the effect that a Treaty should be interpreted holistically and purposively. In this connection, Article 123(6) must not be read selectively or in isolation. It must be read together with other Articles of the Treaty. Indeed, in the instant case, the whole Article 123 must be read with Articles 11, 14 and 71 of the Treaty. These Articles are complementary. Read as a whole, they lead us to the conclusion that even if the Appellant's contention that the process of Political Federation was initiated by the 13th Summit in Bujumbura (which we do not accept), the Summit did not exceed its authority. The Summit is the driver of the engine of the locomotive of East African Integration and Political Federation.
47. In the result, the Appellant fails as well on this second sub-issue of Issue No. 1.

Issue No. 2: Whether the First Instance Division committed judicial irregularities when addressing the question of the Summit's directives to the Secretariat?

48. As we understood it, the crux of the Appellant's contention was that the First Instance Division distorted his arguments; lacked neutrality (i.e. favoured the Respondent's positions); and showed ill-will, rather than "good faith" in interpreting Articles 6, 7, 73, 123 (6), and 138 of the Treaty contrary to the hallowed principles of the Vienna Convention on the Law of Treaties.
49. As a general proposition, it was up to the Appellant to satisfy the Court of the veracity of his allegations. The general rule on this – which is widely accepted and applied in virtually the entire World's major jurisdictions and systems of law – is that the onus to prove allegations made, is on the person making them. That rule is oftentimes summarized as: "He who asserts, must prove." Indeed, in the practice of similar international courts (such as the Court of Justice of the European Union), that rule is duly recognised:
50. Likewise, in the International Court of Justice ("ICJ"), the position has been articulated as follows:

"In contentious cases, the Court has indicated that judgment on the merits would be limited to upholding such submissions of the parties as have been supported by sufficient proof of relevant facts and are regarded by the Court as sound in law." – see Shabtai Rossene: *The Law and Practice of the International Court [of Justice] 1920 – 2005 Fourth Edition, Vol. III*, Procedure (Martinus Nijhoff Publishers), III. 256 at p.1036.

Thus, the ICJ rule is quite evident. It is the litigant who is seeking to establish a fact, who bears the burden of proving it – see the cases of *Military and Paramilitary Activities in and Against Nicaragua (Jurisdiction and Admissibility Case, [1984] 392,*

*437 (para 101); and Land and Maritime Boundary between Cameroon and Nigeria Case, [2002] 303, 453 (para 321).*

51. In paragraph 3.03 of his written submission (dated 12th February, 2013), the Appellant alleged "distortion of my arguments…for the sake of favouring the Respondent".
52. In the instant case, the Appellant needed to do two things. First, and fundamentally, he needed to provide all the meat, necessary to cover the mere skeletal bones of his various allegations. For instance, he needed to provide the detailed particulars and substance of how and where the first Instance Division:
    - "distorted" his arguments;
    - lacked "neutrality" (or, more accurately, "impartiality") vis-à-vis the two Parties;
    - showed "favoritism" for the Respondent, and "bias" or prejudice against the Appellant;
    - interpreted the Treaty with "ill-will" (i.e. without "good faith");

    On the whole, the Appellant fell short of providing succinct and precise particulars of his diverse allegations.
53. Secondly, the Appellant needed to prove each and every particular of his allegation. In this, again, he fell short. The most he could attain to were generalized statements of allegations – without supporting proof.
54. In paragraph 3.03 of his written submission (dated 12th February 2013), the Appellant alleged "distortion" of his arguments…for the sake of favoring the Respondent". We found no "distortion" in the First Instance Divisions' assessment of the Appellant's (the then Applicant's) submissions. True, the Court did prefer the Respondent's position on some issues (as against the position of the Appellant). However, to prefer one side of the Parties' arguments, is every Court's usual and expected duty: a duty which oftentimes requires the Court to carry its professional cross – in as much as the losing Party (as is evident in the instant case) is likely to cry foul, for no reason at all, other than the loss of that Party's argument.
55. Similarly, in paragraphs 3.04 – 3.08 of his written submissions, the Appellant alleges "ill-will" in the First Instance Division's interpretation of the Treaty. By "ill-will", the Appellant most probably meant "bias" (i.e. animosity, prejudice, and bad or evil intentions). The Appellant's reasoning on this issue was rather circular. He argued, for instance, that "the Court committed an irregularity by committing excessive irregularities."
56. In effect, the Appellant (in paragraph 3.07); contended that the First Instance Division "utilized excessive judicial irregularities in determining Issues No. 1, 2, 3 and 4… with intent of favouring the Respondent". Be that as it may, failure to interpret the Treaty, or to interpret it erroneously, does not constitute a procedural irregularity. An irregularity is a procedural shortcoming; not a substantive error of interpretation of the law.
57. We find no bias or favouritism on the part of the First Instance Division's interpretation of Articles 6, 7, 73, 123(6) and 138 of the Treaty. On the contrary, the Court (as expressly quoted by the Appellant himself) did cite Article 31 (1) of the Vienna Convention on the Law of Treaties – namely:

    "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 objectives and purpose."

**Good Faith Interpretation**

58. Interpreting treaties in "good faith" is a basic and fundamental principle under Article 31 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"). The notion "good faith" signifies first, a presumption that the provisions and terms of the Treaty under interpretation, were intended to mean something; rather than nothing—see Minority Opinion in the *Iran - US Claims Arbitration (1981) International Law Reports (ILR) 62 (1992) 603; Jacobs: International & Comparative Law Quarterly (ICLQ) 18(1969) 333.*
59. Secondly, " good faith" requires the Parties to a Treaty to act honestly, fairly, and reasonably; and to refrain from taking unfair advantage--see Interpretation of the Algerian Declaration of 19th January 1981 by the *Iran – US Claims Tribunal, International Law Reports (ILR) 62 (1982) 605f* (" spirit of honest and respect for law").
60. Thirdly, the notion "good faith" prevails throughout the process of interpretation – see Yassen, RC 151 (1976 III) 22f. In this regard, the *Commentary on the 1969 Vienna Convention on the Law of Treaties by Mark E. Villiger, Martinus Nijhoff Publishers (2009)* at page 426, expounds on this element of good faith as follows:
"Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context (N.9) and of other means of interpretation. In particular, good faith implies consideration of the object and purpose of a treaty (N.12). It plays a part in establishing the 'acceptance' in subpara. 2(b)(N.19) and in evaluating subsequent practice as in subpara. 3(b)(N.22). Finally, good faith assists in determining recourse to the supplementary means of interpretation in Article 32 (q.v., N.11)."
61. From the application of the above-quoted "good faith" principles, we cannot find any impropriety that was allegedly committed by their Lordships of the First Instance Division in their interpretation of any of the provisions of the EAC Treaty. Consideration of a Treaty's objectives and purpose, together with good faith will assure the effectiveness of the terms of that Treaty. In the instant case, the Appellant would have the Summit's powers (on the process of Political Federation) limited to giving directives only to the Council of Ministers — and not to the Secretariat or to any other organ or person. That interpretation calls for an overly literal and strict reading of Article 123(6) (i.e. *jus scriptum*) -- one which calls for a reading of the Article selectively and in isolation from all other provisions of the Treaty. Such interpretation (while not invalid per se), would nonetheless drastically constrain and unjustifiably constrict the reasonable and logical exercise of the sovereign powers of the Summit under the Treaty.
62. In the same vein, and given the entire scope of the EAC Treaty, as well as the objective and purpose of that Treaty (to effect Economic Integration and, ultimately, a Political Federation of East Africa), the Summit (as Pilot of that mammoth vessel of Integration) must be allowed appropriate flexibility, reasonable leeway and a meaningful margin of appreciation in the exercise of its powers under the Treaty – which a strictly literal and isolated reading of Article 123 (6) would not allow.
63. A more effective and good faith interpretation of that Article would require otherwise. The Court must seek the meaning of Article 123(6) – as, indeed, the meaning of all other Articles -- of the Treaty, from a more liberal, purposive and functional approach

to interpretation. To this end, we agree with the emphasis of the *Commentary on the Vienna Convention (supra)* at page 428 that:

"As the ILC Report 1966 expounded: "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effect, good faith and the object and purposes of the treaty demand that the former interpretation should be adopted— [see YBILC 1966 II 219, para.6]".

64. We find that the First Instance Division, in its interpretation of the Treaty, did indeed adhere to the above-quoted terms and principles of the Vienna Convention; and did faithfully consider the underlying objectives, and purpose of the East African Community Treaty as the guiding principles for the interpretation of the various provisions of the Treaty.

Accordingly, the Appellant fails on Issue No. 2.

Issue No. 3: Whether the First Instance Division in reaching its Judgment, failed to consider the Appellant's Submissions and Arguments in Paragraph 7, 8, 9 and 11 of the Reference?

65. The Appellant contended very vigorously that the learned Judges did dispose of his Reference without addressing his arguments, submissions and documents. When asked by this Court for better elucidation of his contention, the Appellant made it manifestly clear that it was not a question of mere "marginalization" of his arguments and submissions by the First Instance Division; but rather, that Court's outright refusal or failure to address his arguments at all.
66. This alleged ignoring of a Party's arguments, if true, would be fatal to the exercise of their Lordships' discretion in conducting the Reference, let alone affording the Parties a fair hearing and trial. The cardinal rule being that to have legitimacy, trials must be fair, and the Court's discretion must be exercised judiciously.
67. Accordingly, we did set out to examine their Lordships' Judgment of 17th May 2013, as well as the entire Court Record and allied documentation of the First Instance Division, exhaustively, diligently, meticulously and conscientiously, with a view to establish whether the trial was fair; and whether the Court exercised its discretion judiciously. Our efforts have yielded the following.
68. Right from the outset of their Judgment, their Lordships of the First Instance Division affirmed categorically that:

"21. We have read the following documents on record:

(i) The Reference titled 'Application dated 12th January 2012'
(ii) The Response to the Reference together with the Affidavit in support, both dated 28th February 2012.
(iii) The Reply to the Response dated 20th March 2012.
(iv) The Response to the Reply to the Response dated 8th May 2012.
(v) Applicant's written submission filed on 13th February, 2013.
(vi) Respondent's written submission filed on 14th March 2013.
(vii) Applicant's rejoinder to the Respondent's written submission filed on 15th April 2013.

69. We have also taken into account the annextures to the documents placed before us including the Communiqué under attack, the Communiqué issued after the 14th Summit, the Report of the 11th Meeting of the Sectoral Council on Legal and

Judicial Affairs, the Report of the 20th Meeting of the Council of Ministers, the draft Protocol on Immunities and Privileges of the East African Community, its Organs and Institutions, the Headquarters Agreement between the Government of Kenya and the Community for the Lake Victoria Basin Commission, and the Headquarters Agreement between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda."

70. Such was the solemn statement expressed by the Court as it embarked upon writing its Judgment in the Reference. We have no reason to doubt the accuracy, nor the sincerity of that judicial statement. The Appellant provided no scintilla of proof to the contrary. All he stated was a generalized accusation of their Lordships' failure, without any proof of his contention whatsoever. In any event, be that as it may, we set out to test the veracity of their Lordships' statement.
71. We searched, page by page, paragraph by paragraph, of their Lordships' Judgment for proof of their having addressed the Appellant's arguments, etc. We established the following:

    In paragraph 25 of the Judgment, the Court made the following undertakings:

    "All the above documents together with the Treaty will also form the basis for our opinion which we now render as follows:-

    In paragraph 29, the Court stated that:

    "We heard the Applicant to be arguing that privileges and immunities are not areas of co-operation and that under Article 138, only Agreements with Partner States can address those issues. With respect, we disagree with him. We say so because he has taken a very narrow view of what the Treaty sets out as "areas of co-operation". He has also completely failed to note that Chapter 27 of the Treaty is headed "Co-operation in other Fields" and Article 131, the only Article in that Chapter is titled, "Other Fields"…"

    In paragraph 33, the Court stated:

    "The Treaty provisions must be read as complimentary to each other and not (as per the Applicant's line of argument) be seen as independent and in conflict with one another. To argue otherwise would lead to a legal absurdity and a negation of the principle that the Treaty must be interpreted as a whole and not selectively to suit a set purpose."

    In paragraph 34, the Court stated that:

    "We heard the Applicant to argue that the issue of immunities and privileges cannot be one amounting to co-operation because it is personal to the employees of the Community. "Co-operation" is defined in *Black's Law Dictionary*…"

    In Paragraph 36, the Court wrote:

    "…Article 2(a) and (b) of the Proposed Protocol address that provision [i.e. Article 138 (1] while Article 2(c) above is in furtherance of Article 138 (2) and (3) which the Applicant latched onto his submissions."

    In paragraph 42, the Court stated thus:

    "The Applicant's argument in this regard is that by mandating the Secretariat to "propose an action plan" and a "'draft model of the structure of the East African Political Federation'", the Summit acted in breach of the operational principles of the Community (Article 7) and the 'General undertaking as to implementation' of the

Treaty (Article 8) as well as, specifically, Article 123 (6) aforesaid."

In paragraph 43, the Court stated:

"We agree with the Respondent that the Applicant's argument on this issue [of mandating the Secretariat] is misguided. We say so, with respect, because as shall be seen later, initiation of the process of Political Integration and eventual Political Federation was not made at the 13th Summit, but much earlier…"

In paragraph 44, the Court countered the proposition that the Secretariat was "initiating" or "undertaking" the actual process "as alleged by the Applicant."

In paragraph 47, the Court agreed with the Respondent (and, therefore, disagreed with the Applicant), regarding the nature of the "directions given to the Secretariat".

72. It is more than evident from all the above quotations and other references in the Judgment of the First Instance Division, that the Learned Judges had before them a hefty and veritable load of the Appellant's material to tackle. They did, indeed, address the Appellant's arguments virtually in their entirety – certainly all the arguments that were of import to the various holdings that the Court then proceeded to make. Each argument was addressed, discussed, analyzed, weighed, and weighted against competing arguments, before being accepted as logical and applicable; or denied and discarded as being inappropriate or inapplicable to the Reference. To state, therefore, as the Appellant now does, that the First Instance Division failed, refused or otherwise marginalized or ignored his arguments is, at best, mischievous; and, at worst, economical with the truth, distortionary of the actual position, and overly misleading to this Court. There is not the tiniest speck of truth, nor the slightest spike of a basis on which to peg that allegation. Therefore, the Court dismisses it.

Closely allied to the above generalized allegation, was a more specific complaint. One, that deserves detailed attention by this Court.

73. In ground 5 of the Memorandum of Appeal, the Appellant complained that the First Instance Division erred in law and in fact in determining the second issue in favour of the Respondent without taking into account the Appellant's written submission that the Respondent's silence (both in the pleadings and in the submissions) in relation to paragraphs 7, 8, 9 and 10 of the Reference, meant admission of the facts contained therein.
74. That complaint was obviously grounded in Rule 43 of this Court's Rules of Procedure, which provides as follows:

"43. (1) Any allegation of fact made by a party in a pleading shall be deemed to be admitted by the opposite party unless it is denied by the opposing party in the pleading.

(2) A denial may be made either by specific denial or by a statement of non-admission and either expressly or by necessary implication.

(3) Every allegation of fact made in a pleading which is not admitted by the opposite party shall be specifically denied by that party; and a general denial or a general statement of non-admission of such allegation shall not be a sufficient denial."

75. It is clear from the Rules that it is only allegations of fact which are made in pleadings by a party and are not denied by the adverse party which are deemed to be admitted. It is, therefore, necessary to determine:

1) whether the Appellant's allegations made in paragraphs 7, 8, 9 and 10 of the

Reference were allegations of fact; and

2) if so, whether they were denied by the Respondent.

76. Those paragraphs of the Reference were framed in the following terms:- \

"7. That under the provisions of Article 123(6) of the Treaty the process towards the establishment of a political federation of the Partner States can only be undertaken by the Council and not by the Secretariat as directed by the 13th Summit.

8. That by mandating the Secretariat to do the named activities and submitting the proposal to the Summit for consideration, the Summit impliedly and explicitly excluded the Partner States and the Council from the process of spearheading the processes important for the establishment of the East African Federation.

9. The Applicant is aggrieved by the cited directives of the Summit and believes that if they are not rectified; the Treaty for the establishment of the East African Community shall be irrevocably breached.

10. The Applicant is further aggrieved by the fact that the directives were made by the highest organ of the Community, thus setting a very dangerous precedent for future decisions and directives of the other organs of the Community."

77. In our appreciation, the above-quoted paragraph 7 is an outright averment by the Appellant of a point of law, not of fact. It was therefore not imperative for the Respondent to traverse it specifically. Paragraphs 8, 9 and 10, on the other hand, are in our further appreciation, expressions of opinion, not of fact. Accordingly, there was, again, no necessity to traverse them. Be that as it may, we have read with care the Respondent's response to the Reference, as well as his written submissions in this Appeal. We find that in effect, the substance of those paragraphs was responded to by paragraphs 6, 7, 8 and 11 of the Respondent's response. Accordingly, there was an implicit denial within the meaning of Rule 43 (3) of this Court's Rules. The upshot of all this, is that howsoever we examine this element of the Appellant's complaint, it is without merit.

Thus, the Appellant fails on all aspects of Issue No. 3.

Issue No. 4: Whether the Appellant is entitled to the Remedies sought?

78. In his prayer for reliefs, the Appellant sought sundry declarations by this Court concerning alleged breaches, violations and infringements of diverse provisions of the EAC Treaty by the Summit. He also sought an award of personal damages in the amount of US Dollars 60,000. The issue is whether he is entitled to those reliefs?

79. Given the findings on all the issues set out above, we can be relatively brief in the disposal of Issue No.4. First, the prayers for the respective declarations sought cannot succeed – given the Appellant's failure on all the substantive issues concerned. Second, the underlying Reference giving rise to this Appeal – like the overwhelming majority of References that are typically brought before this Court – was grounded not in tort or in contract. Accordingly, the question of an award of the kind of damages for personal injury now claimed by the Appellant, does not and cannot arise. The Appellant's claim of USD Dollars 60,000 damages for emotional loss and mental anguish arising from the Summit's alleged infringement of the EAC Treaty is misconceived.

80. In any event, as explained above, the Appellant having failed on all the other issues raised in this Appeal, cannot succeed on the issue of any of the remedies and reliefs

sought.

**Conclusion**

81. In the result, the Appeal is dismissed. Each Party shall bear its own costs; both in this Division and in the First Instance Division.

It is so ordered.

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East African Court of Justice - Appellate Division
Appeal No. 3 of 2013
Appeal from the Judgment in Reference No.6 of 2010-First Instance Division, Johnston Busingye, P.J; Jean Bosco Butasi, J; & Isaac Lenaola, J., dated 2nd September 2013

**Alcon International Ltd And The Standard Chartered Bank of Uganda, The Attorney General of Uganda & The Registrar, High Court of Uganda**

Before: Emmanuel Ugirashebuja, P; Liboire Nkurunzinza, VP; James Ogoola, JA; Edward Rutakangwa, JA; and Aaron Ringera, JA
July 27, 2015

*Lack of jurisdiction ratione materiae and jurisdiction ratione personae - No retroactive application of the Common Market Protocol - Protection of cross-border investments by Partner States - The doctrine of mootness- Whether the Trial Court erred in finding there was no cause of action against the 2nd Respondent.*

*Articles: 27 (2), 30(1), 76 (4), 104 of the EAC Treaty - Article 54 (2) (a), 55 of the EAC Common Market Protocol.*

This Appeal arose from Reference No. 6 of 2010 wherein the Appellant / Applicant sought *inter alia* interpretation of the Treaty and the Common Market Protocol with respect to cross border trade disputes between persons emanating from the Partner States. After a lengthy process, the Reference was heard on its merits and the First Instance Division found that: there was, no cause of action against the Attorney General of Uganda; that the Common Market Protocol could not apply retroactively to acts that took place before 1st July, 2010; that the Court lacked jurisdiction to determine those matters and thus addressing the other issue would be an academic exercise. Each party was to to bear its own costs. Being dissatisfied by the judgment, the Appellant lodged this appeal alleging several errors in law.

In Cross-Appeal, the Respondenrts contended that the Trial Court erred in law by declining to award costs to the Respondents and in deciding that each party should bear its own costs.

**Held:**

1) Under Article 30 of the Treaty, the only proper Respondent to References by legal and natural persons are Partner States or Institutions of the Community the legality of whose Acts, regulations, directives, decisions or actions are brought into question of the Treaty. Thus the Bank and the Registrar were improperly brought before the Court.
2) While Article 54 (2) of the Common Market Protocol provides that Partner States guarantee that any person, whose rights and liberties which are recognized by the Protocol have been infringed, has the right to redress, the duty to protect cross-border investments is on Partner States. Only within national institutions can any Partner

State guarantee the adjudication of disputes by aggrieved persons through the State's competent judicial, administrative or legislative authority or any other competent authority. The Protocol did not entrust the redress of non-inter-state State Common Market complaints to the EACJ therefore the Trial Court lacked jurisdiction ratione materiae to entertain the Reference.

3) A Partner State is the only proper Respondent to an action by a legal or natural person under the provisions of the Common Market Protocol. A challenge against the actions or omissions of public officials acting in their official capacity, must be lodged against the Partner State and not the officials.
4) There could not be a cause of action against the Attorney General of Uganda founded on his alleged omission to see to it that the Claimant's rights under the Protocol were protected. Therefore there was no inter- party dispute for resolution by the Court.
5) In denying the Respondents their costs, the Trial Court exercised its discretion improperly. Thus the Cross-Appeals were allowed with costs to the Respondents.

**Cases cited:**

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

Attorney General of Kenya v Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011

Borowski v The Attorney General of Canada, [1989] S.C.R. 34

Emmanuel Mwakisha Mjawasi & Others v. The Attorney General of Kenya, EACJ Reference No. 2 of 2010

Island of Palmas, Perm. Ct. Arb. 1928

Modern Holdings ltd v Kenya ports Authority, EACJ Reference No. 1 of 2008

**Judgment**

**Introduction**

1. The facts of the matter before us are discernible from the record of Appeal and are as below.
2. Alcon International Ltd hereinafter "the Appellant") was registered and incorporated in Kenya as Company No: c 9646 by the Registrar of Companies at Nairobi in January, 1971.
3. On 21st July, 1994, the Appellant entered into an agreement with the National Social Security Fund ("NSSF") of Uganda for completion of a partially constructed structure in reinforced concrete within the City of Kampala.
4. According to the contract, the Appellant was to be paid $16,160,000 after the completion of the structure later to be known as "Workers House". A company known as Alcon International Ltd (Uganda) (herein "Alcon Uganda") is the one that carried out the execution of the contract.
5. On various dates between 11th December, 1997 and 30th April, 1998, NSSF wrote to the Appellant giving notice of termination of the contract due to defaults allegedly committed by Alcon Uganda. After lengthy correspondence between the parties, the

Contract was formally terminated on 15th May, 1998.

6. On 30th November, 1998 the Appellant sued NSSF in HCCC No. 1255 of 1998, seeking relief for wrongful termination of the Contract. The Court advised the parties to proceed to arbitration of their dispute; and they did so.
7. The Arbitrator awarded the Appellant a sum of $ 8,858,469.97.
8. NSSF challenged the Arbitral Award before the High Court but its appeal was dismissed and the Arbitral Award was affirmed. NSSF then filed Civil Appeal No. 2 of 2004 before the Court of Appeal of Uganda challenging the Judgment of the High Court.
9. As a condition for the stay of execution of the High Court decree pending the hearing and final determination of the appeal by the Court of Appeal, the High Court ordered NSSF to provide a bank guarantee for the decretal amount and interest thereon and costs.
10. The Standard Chartered Bank ("the Bank"), the first Respondent herein, at the request of NSSF provided the requisite guarantee dated 29th October, 2003 undertaking and guaranteeing to pay to the Registrar of the High Court of Uganda (hereinafter "the Registrar"), the third Respondent herein, on account of the Appellant, the sum of USD 8,858,469.97 plus accrued interest and costs. The said guarantee was to remain in force for a period of one year subject to renewal for subsequent periods not exceeding one year upon receipt of a written request from the Registrar 15 days before the expiry date until final determination of the appeal by the Court of Appeal. The liability of the Bank would be extinguished by payment to the Registrar of the respective sums of money or upon expiry of the guarantee.
11. The appeal was finally decided and determined in favour of the Appellant in a Judgment of the Court of Appeal delivered and dated the 25th August, 2009.
12. On 26th August, 2009, the Appellant wrote to the Bank enclosing the Judgment of the Court of Appeal and demanding payment of the guaranteed sums to the Registrar and directing the Registrar to forward the said sums to the Appellant.
13. On 31st August, 2009, the Bank declined to honour the guarantee and alleged that the said demand ought to be made by the Registrar as opposed to the Appellant. It also requested that the decree be attached to the demand.
14. On 2nd September, 2009, and by two letters of the same date, the Appellant wrote to the Bank and the Registrar enclosing the decree and requesting both of them to move expeditiously and take immediate action for payment of the due sums within the time limited by the guarantee.
15. While the Appellant was awaiting payment of the guarantee, NSSF moved to the Supreme Court of Uganda which in Civil Application No. 20 of 2009, made Orders on 9th September, 2009 staying the execution of the Arbitral Award pending the disposal of an appeal for which notice had already been filed by NSSF and a firm of Advocates known as W. H. Ssentoogo t/a Ssentoogo & Partners. The Supreme Court further ordered the Applicants before it to deposit a bank guarantee in the name of the Registrar of the Supreme Court in the full amount awarded together with the accrued interest and that the guarantee should also guarantee the payment of taxed costs. The said guarantee was to be issued by the same bank and be in similar form to the guarantee which had been used to obtain a stay in the High Court.

16. On 14th September, 2009, NSSF wrote to the Bank informing it of the Supreme Court's Order of Stay of execution of the Court of Appeal Judgment and the requirement for a fresh guarantee. The Bank was further informed by NSSF that the existing guarantee had been overtaken by events and should be cancelled in favour of a fresh guarantee in favour of the Registrar of the Supreme Court.
17. On 21st December, 2009 the Bank in compliance with the instructions of NSSF issued a fresh guarantee in favour of the Registrar of the Supreme Court in the total amount of $ 13,360,874.97 as per Supreme Court Orders.
18. While the matter was pending for determination in the Supreme Court, the Appellant moved to the First Instance Division of this Court (hereinafter "the trial Court") by way of Reference No. 6 of 2010 dated 20th August, 2010.
19. While the Reference was pending determination in the trial Court, the Supreme Court of Uganda on 8th February, 2013 delivered its Judgment and ordered that (i) the arbitral award and the decision of the High Court be set aside, (ii) that the Judgment of the Court of Appeal be similarly set aside, and (iii) that HCCC No. 1255 of 1998 be returned to the High Court for trial afresh. The Supreme Court reasoned that the Award was made in the absence of a cause of action against the appellants and that it was obtained illegally and contrary to public policy and that HCCC No. 1255 of 1998 was wrongly referred to Arbitration.

**The Reference to the Trial Court.**

20. In the Reference, the Appellant sued the Bank, as the 1st Respondent; the Attorney General of Uganda for and on behalf of the Government of Uganda (hereinafter "The Attorney General"), as the 2nd Respondent; and the Registrar, as the 3rd Respondent.
21. As against the Bank, the Appellant averred that it was in breach of its duties as a reputable bank in failing to honour the guarantee dated 29th October, 2003.
22. As against the Registrar, the Appellant averred that he was in breach of his duties as a public officer by failing to make any or any timely demand for payment of the due sums under the subject bank guarantee.
23. The Appellant further averred that it wrote on several occasions to the Chief Justice of Uganda on the stalemate but there was not a single response from the Chief Justice, thereby signaling a failure of prompt justice to trading persons from the Republic of Uganda and, accordingly, the Attorney General of Uganda, as the Principal Legal Advisor to the Government of Uganda was fully responsible for such failure.
24. The Appellant further averred that by virtue of the aforesaid breaches, the Respondents infringed/violated the spirit and letter of the Protocol on the Establishment of the East African Common Market ("the Protocol") and in particular Article 29 thereof on the protection of Cross-Border Investments and Returns of investments of other Partner States.
25. The Appellant further averred that the Attorney General failed to ensure that Government officials of the Republic of Uganda, including the Registrar, carry out their duties to ensure protection and security of investments and to foster trade within the East African Community as envisaged under the East African Treaty("the Treaty") and the Protocol, within the East African Community.
26. The Appellant further averred that failure of the Respondents to honour their legal

and contractual obligations was against the spirit and letter of the Treaty and the Protocol to the extent that the Bank having given a valid guarantee in the High Court to secure payment of a decretal amount, failed to honour the said guarantee.

27. The Appellant further averred that upon its signature on 20th November, 2009 and the coming into force of the Protocol on 1st July, 2010, and by virtue of Article 54 (2) thereof, the jurisdiction of this Court as envisaged by Article 27 of the Treaty and as a competent judicial authority in the Community, was enhanced for the enforcement of the rights and obligations accruing to trading persons from different Partner States.
28. Lastly, the Appellant averred that by virtue of Articles 27 (2) and 151 of the Treaty and Article 54 (2) (b) of the Protocol, International Banking law and practice and the Rules of natural justice, this Court as a competent judicial authority had jurisdiction to determine, dispose of and grant the prayers sought in the Reference.
29. The Prayers sought in the Reference were:-
    (i) That the Court interpret and apply Articles 27(2) and 151 of the Treaty together with Articles 29(2) and 54(2) (b) of the Protocol on the enhanced jurisdiction of Court with regard to the enforcement and enhancement of trade and resolution and settlement of disputes for the protection of cross border investments;
    (ii) That the Court declare that the signing of the Protocol and the coming into force of the said Protocol on 1st July 2010 enhanced the jurisdiction of the Court as envisaged under Article 27(2) for the determination of cross border trade disputes between persons emanating from partner states;
    (iii) That the Court declare that where a public official of a Partner State fails to honour his/her obligation/duty, statutory or legal, to a person from a different Partner State, then under the spirit and letter of the Treaty and Protocol, the Court has the jurisdiction to enforce that obligation or duty expeditiously;
    (iv) That the Court direct the Respondents jointly or severally to pay to the Claimant the decretal sum of $ 8,858,469.97 together with interest and costs in full under the Bank guarantee dated the 29th October,2003;
    (v) That the Court direct the Respondents jointly and or severally to pay to the claimant general damages assessed by this court;
    (vi) That the Court directs the Respondents jointly and or severally to pay interest on the sums of money on such rates and from such dates as this Court should direct;
    (vii) That the Court make such further or other orders as may be necessary in the circumstances; and
    (viii) That the costs of this Reference be borne by the Respondents in any event.
30. After the pleadings in the Reference were filed by all the parties, a scheduling conference was held by the trial Court on 25th February 2011. At the conference, the Bank raised a number of preliminary points of law. The points raised were:
    a) Whether the Reference was properly before the Court as against the Bank and the Registrar;
    b) Whether the Reference was time barred; and
    c) Whether the Claimant had rights under the Protocol in respect of acts which arose prior to the coming into force of the said Protocol.
31. After hearing the Parties' arguments, the trial Court took the view that there were judicial proceedings going on in the Courts of Uganda concerning the matters

raised in the Reference and it would, in the circumstances, be absurd to have parallel proceedings in two different courts with a probability of a clash of decisions and an execution stalemate. The Court found it was improper for the Appellant to have abandoned the litigation before the Courts in Uganda and seek sanctuary in this Court. For that reason, the Court found and held that the Reference was improperly before the Court as against all the Respondents. So point (a) of the preliminary objection was answered in the negative.

32. The Trial Court did not think it necessary to consider the other points of objection raised and ordered that the Reference be struck out with costs to the Respondents.

Appeal Against the Trial Court's Ruling on the Preliminary Objections.

33. The Appellant appealed against the above Ruling in Appeal No. 2 of 2011: *Alcon International Ltd vs. The Standard Chartered Bank of Uganda & 2 Others*. Upon hearing arguments from the parties, the Appellate Division held that the trial Court did not discuss nor did it make a finding of whether it had jurisdiction to entertain the Reference. It stated that that was a fundamental issue on which the Court below had to decide as a threshold issue. In the course of so holding, the Court cited with approval the decision of the Kenyan Court of Appeal in the case of the Owners of the motor Vessel "*Lillian" S vs. Caltex oil (Kenya) Ltd [1989] KLR I*, at Page 14, where Nyarangi, J.A. postulated the law thus:

"Jurisdiction is everything. Without it, a Court has no power to make one 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"

34. In the result, the Appellate Division allowed the Appeal, set aside the order of the trial Court, re-instated Reference No. 6 of 2010, and directed the trial Court to specifically determine the merits of the Reference before it. In view of the holding of the Appellate Division in the above paragraph, It was implicit in this direction that the issue of jurisdiction of the trial Court to entertain the Reference was to be canvassed and dealt with as part of the merits of the Reference.
35. At the scheduling conference held by the trial Court on 3rd May, 2012, the Parties agreed that the following were the issues to be determined by that Court :-
    i) Whether the Reference was properly before the 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;
    ii) Whether the Claimant had a cause of action against the Attorney General of Uganda;
    iii) Whether the Court had jurisdiction over acts that took place before the coming into force of the Protocol;
    iv) Whether the Reference was time barred in accordance with Article 30 (2) of the Treaty;
    v) Whether the provisions of Article 54(2) of the Protocol extended the jurisdiction of the Court for settlement of cross border investment disputes;
    vi) Whether the Respondents were in breach of Articles 27 and 151 of the Treaty as read together with the provisions of Article 54 of the Protocol by failing to honour or act in accordance with the bank guarantee dated 29th October, 2003

as amended on 23rd October, 2008;

vii) Whether the Claimant was entitled to the prayers sought in the Reference dated 20th August, 2010.

**The Determination by the Trial Court.**

36. Having read and taken note of the Reference, the pleadings and Affidavits filed by the Parties, the written submissions, all annextures including the Contract between the Parties for erection of "Workers House" in Kampala, the Rulings and Judgments of the National Courts in Uganda, the Arbitral Award and the guarantee, the Court determined the agreed issues as below.

Issue No. 1: Whether the Reference was properly before the Trial 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?

37. After considering the provision of Article 30 (1) of the Treaty and the definitions of the words "Partner State" and "Institution" in the Treaty, the Trial Court found and held that neither the Bank nor the Registrar were a Partner State or an Institution of the Community and they could not, therefore, be properly sued in that capacity before the Court as they were not bound by the Treaty or any of its Protocols. The Court was fortified in its view by its previous decision in the case of *Anyang' Nyong'o & Others Vs the Attorney General of the Republic of Kenya and Others,[ Ref. No. 1 of 2006*] where the Court held that:-

"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 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."

38. The trial Court also took note that in *Modern Holdings (E.A.) Ltd. vs. Kenya Ports Authority, [Ref. No. 1 of 2008]*, the Court had stated that the Kenya Ports Authority, though rendering services to the Partner States and their Citizens, did not ipso facto become an institution of the Community within the meaning of Article 30 of the Treaty as it was not created by the Summit of the Community, but by the Republic of Kenya.

39. In the result, all the complaints against the Bank and the Registrar were dismissed.

Issue No. 2: Whether the Claimant had a cause of action against the Attorney General?

40. The trial Court took note of the Claimant's submissions that the gravamen of its case was that the Republic of Uganda had 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 Protocol as embodied in (i) the wrongful termination of the building contract by the NSSF, (ii) the refusal by NSSF to pay for work done; (iii) the continued confiscation of the Claimant's plant, machinery and tools of trade, (d) and failure and/or refusal by the Bank and the Registrar of the Court to honour the Guarantee in spite of Rulings and Judgments of the High Court, and of the Court of Appeal of Uganda in its favour; (iv) failure and/or denial of justice as particularized by the Claimant. Having taken note of the foregoing, the Court looked at the matter in the

context of the whole Reference and concluded that the substratum of the Reference was the bank guarantee dated 29th October 2003 as amended on 23rd October, 2008.

41. The Trial Court found that by virtue of the Decision of the Supreme Court of Uganda which set aside the Arbitral Award and the Decisions of both the High Court and the Court of Appeal for Uganda which were all in favour of the Claimant, the bank guarantee issued as a condition for stay of execution of the Arbitral Award, and the Court costs ceased to exist and, accordingly, the whole reference had to collapse. The Trial Court found that the substratum of the Reference had gone and there was, in the circumstances, no cause of action against the Attorney General of Uganda.

    Issue No. 3: Whether the Trial Court had Jurisdiction over acts that took place before the coming into force of the Protocol?

42. The Trial Court noted that it was common ground that the alleged breach of contract by the Bank and the Registrar to honour the guarantee, the Arbitral Proceedings and Award, the Orders of the High Court and Court of Appeal of Uganda and the issuance of a bank guarantee, all occurred before 1st July, 2010 when the Common Market Protocol entered into force.
43. The Trial Court further noted that the Claimant's contention was that the issue of whether the Court had jurisdiction over acts that took place before the Protocol entered into force, had been overtaken by events since the Appellate Division had directed in its ruling dated 16th March, 2012, that the trial Court should proceed and "determine the merits of the Reference before the Court." In addition, according to the Claimant, (i) the Respondents were guilty of a continuing breach of their obligations under the guarantee and, therefore, the issue of retroactivity did not arise because it was expressed in the guarantee that the liability of the Bank should be extinguished by payment to the Registrar of the decretal amount; (ii) the rule as to non-retroactivity of Treaties did not apply where "a different intention appears from the Treaty or is otherwise established", and (iii) although the Common Market Protocol came into force on 1st July, 2010, Article 151 (4) of the Treaty indicated that once a Protocol is signed and ratified, it became an "Integral Part" of the Treaty and it followed that the Common Market Protocol should be read as "an Integral Part" of the Treaty.
44. The Trial Court noted the Respondents' submissions on those issues which were:-
    i) A Treaty could not apply to acts that took place before it came into force unless it was expressly stated so or such an intention could be inferred from its provisions;
    ii) No provision could 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 had been discussed by the Court in *Emmanuel Mwakisha Mjawasi & 748 Others Vs Attorney General of Kenya EACJ [Appeal No. 4 of 2011]* where it was held that the Treaty cannot apply retroactively unless such intention derives explicitly from the provisions of the Treaty itself or may be implicitly deduced from the interpretation thereof;
    iv) A plain reading of Article 55 of the Common Market Protocol showed that the Treaty could not apply to events prior to its ratification;
    v) Nothing in the Protocol pointed to an intention by the parties thereto for its retrospective application and, accordingly, it could not apply to a 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 much later, on 1st July, 2010.

45. On consideration of the rival arguments, the Trial Court accepted that the Protocol is an integral part of the Treaty, that it entered into force on 1st July, 2010, that on a consideration of Articles 28 and 31 of the Vienna Convention on the Interpretation of Treaties, nothing showed that the framers of the Protocol had any intention of its retroactive application and, accordingly, the Common Market Protocol cannot apply to acts that took place before 1st July, 2010; and the Court lacked jurisdiction to determine those matters.
46. The Trial Court noted there was a nexus between non-retroactivity of a Treaty and its jurisdiction. It took into account the Appellate Division's decision in *Emmanuel Mwakisha Mjawasi & 748 Others (supra)* where the Court delivered itself 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 of the case there and then. As non-retroactivity renders the Treaty inapplicable forthwith, what else can confer jurisdiction on the Court?"
47. The Trial Court also took into consideration the Appellate Division's holding in *Attorney General of the United Republic of Tanzania Vs African Network for Animal Welfare [EACJ Appeal No.3 of 2011]* on the question of jurisdiction where the Court observed-
"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."
48. Having determined issues Nos. 1, 2 and 3 in favour of the Respondents, the Trial Court concluded that the Reference had to collapse and any determination of issues Nos. 4, 5, 6 and 7 was wholly academic and it declined to take such a path. In the result, it dismissed the Reference.
49. As regards costs, the Court observed that the Claimant had been seeking justice for long and was yet to finalize HCCC No. 1255 of 1998 in Uganda which was the original case in the dispute. In the circumstances, it deemed it inappropriate to penalize it with costs and ordered that each party should bear its own costs.
The Appeal and the Cross-Appeals to the Appellate Division.
50. The Appellant was dissatisfied with the whole of the said judgment. It accordingly appealed therefrom by instituting this appeal.
51. The Memorandum of Appeal enumerated a suffocating thirty one (31) grounds of appeal.
52. The Bank, on its part, lodged a Notice of a Cross- Appeal on 18th November, 2013 pursuant to the provisions of Rule 91 of this Court's Rules. The Attorney General, and, the Registrar did likewise on 4th December, 2013. In their respective Notices of Cross- Appeal, the Bank contended that the Trial Court erred in law by declining to award costs to the Respondent and the Attorney General and the Registrar likewise

contended that the Trial Court erred in law when it decided that each party should bear its own costs.

53. At the Scheduling Conference of the Appeal pursuant to Rule 99 of the Court's Rules held on 21st August 2014 the Parties agreed that those grounds of Appeal and of the Cross- Appeals by the Respondents may be distilled and compressed into the following issues:-
    i) Whether the Trial Court erred in law in holding that the Reference as against the 1st and 3rd Respondents was improperly before it within the meaning of Article 30 (1) of the Treaty;
    ii) Whether the Trial Court erred in law in finding that there was no cause of action against the Attorney General of Uganda;
    iii) Whether the Trial Court erred in law in finding that it had no jurisdiction over acts that took place before the coming into force of the Common Market Protocol;
    iv) Whether the Trial Court erred in law in holding that issues 4, 5, 6, and (7) (as framed in the Scheduling Conference) would be wholly academic; and
    v) Whether the Trial Court erred in law in failing to award costs to the successful parties.
54. We propose to deal with the above issues in the order in which they are formulated above.

    Issue No. 1: Whether the Trial Court erred in law in holding that the Reference as against the 1st and 3rd Respondents was improperly before it within the meaning of Article 30 of the Treaty?

**Appellant's Case**

55. The substance of the Appellant's case was that Article 54 (2) (a) of the Common Market Protocol extended the jurisdiction of this Court to determine disputes brought by individuals and legal persons against other individuals and legal persons with respect to infringement of rights and privileges recognized by the Common Market Protocol. Accordingly, as the Appellant's grievance was the failure by the Registrar to recall the Bank guarantee and failure by the Bank to honour the said guarantee, both the Bank and the Registrar were properly before the Court.

**1st and 3rd Respondents' Case.**

56. The substance of their case was, first, that they were neither Partner States nor Institutions of the Community within the meaning of Article 30 of the Treaty; and, secondly, that Article 54 of the Common Market Protocol did not and could not have extended the jurisdiction of the Court as contended by the Appellant. Any extension of the Court's jurisdiction could only be done pursuant to the provisions of Article 27 (2) of the Treaty. It was their case that Article 27 (2) was clear that extension of the Court's jurisdiction required the conclusion of a Protocol to operationalize such extended jurisdiction; and that the Common Market Protocol, which was concluded pursuant to Article 76 (4) of the Treaty, was not the kind of Protocol contemplated by Article 27 (2). The point was also taken by the Attorney General that Article 54 (2) of the Common Market cannot in any case impose liability on private persons, and only the Attorney General could be sued.

**The Court's Determination**

57. The determination of this issue, as well as of Issues No. 2 and 3 ;and, to some extent, Issue No.4 calls upon this Court to pronounce itself on the concept of jurisdiction and its application in the context of the Treaty.
58. In the practice of the International Court of Justice, the word jurisdiction is used as a unitary concept to denote three essential elements which enable the Court to operate. These are *jurisdiction ratione materiae, jurisdiction ratione personae and jurisdiction rationae temporis (see Shabtai Rosenne: The Law and Practice of the International Court [1920-2005]*, Vol. II, Chapter 9. *Jurisdiction rationae material* is concerned with the power of the Court to entertain and decide the subject matter of the complaint before it. *Jurisdiction ratione personae*, on the other hand, pertains to the capacity of the parties to appear before the Court as applicants or as respondents or in any other capacity. And *jurisdiction ratione temporis* focuses on the temporal condition of the dispute before the Court, such as time bar or limitation. The East African Court of Justice (EACJ) as an international court in its own right takes inspiration from the International Court of Justice's conceptualization of jurisdiction and shall adopt it for our analysis hereinafter.

**The Court's *Jurisdiction Ratione Personae***

59. The issue of the propriety of the Bank and the Registrar being impleaded in the Reference is one of *jurisdiction ratione personae*.
60. Articles 28, 29, 30, 31, 32, 36 and 40 of the Treaty all address the concept of the Court's *Jurisdiction ratione personae*. Broadly speaking, the Court is approached by way of a Reference by either (i) the Partner States (Article 28), or (ii) the Secretary General (Article 29), or (iii) Legal and Natural Persons (Article 30); or (iv) employment disputes (Article 31); or (v) Arbitral References by the Community or any of its institutions, a Partner State or a Person (Article 32); or (vi) for an Advisory opinion at the instance of the Summit, the Council or a Partner State (Article 36), or (vii) for an Intervention by a Partner State, the Secretary General or a resident of a Partner State (Article 40). In all those situations, the Treaty is quite clear as to who has the capacity to be the Applicant, or the Respondent or the Intervenor, as the case may be.
61. The Reference subject matter of the Appeal herein was filed by a legal person (Alcon International Ltd) against the Standard Chartered Bank of Uganda, the Attorney General of the Republic of Uganda, and the Registrar of the High Court of Uganda, under Article 30 of the Treaty. The propriety of impleading the Bank and the Registrar was the subject matter of Issue No. 1 In this Appeal. Article 30 (1) of the Treaty reads 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."
62. The case for the Bank and the Registrar was simply that as they were neither a Partner State, nor an Institution of the Community, they could not be proper Respondents to the Reference. Apart from relying on the plain text of the Treaty itself, they also relied

on this Court's Decision in the cases of *Anyang Nyong'o & Ohers vs. The Attorney General of Kenya & Others [EACJ Reference No. 1 of 2006*] and the case of *Modern Holdings ltd VS Kenya ports Authority [EACJ Reference No. 1 of 2008*].

The Appellant, on its part, argued that Article 30 of the Treaty is subject to Article 27 thereof, and, in the circumstances of this case, the Protocol extended this Court's jurisdiction under Article 27 (2) and Article 54 (2) thereof, and, accordingly, brought the Bank and the Registrar within the jurisdiction of the Court, thus making them proper Respondents to the action.

63. The Attorney General and the Registrar responded to the above contention by submitting that the Protocol only created legal liability on Partner States as parties to the Protocol, and, by force of Article 29 of the Protocol, the legal duty or obligation to protect cross border investments was placed solely upon the Partner States. They further submitted that the words "even where", in sub-Article (2) (a) of Article 54 of the Protocol, cannot be construed to guarantee a right of redress against persons acting in their official capacities in Partner States. They further submitted that under Article 31 (1) of the Vienna Convention on the Law of Treaties, a Treaty must 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 objects and purpose, and that if such an approach is adopted, it would lead to the conclusion that liability under Article 29 of the Protocol as read with Article 54 (2) thereof attaches to States, and not to individuals or national institutions.
64. The Bank, on its part, submitted that the Protocol is not the kind of Protocol envisaged under Article 27 (2) of the Treaty for extension of the Court's jurisdiction: a Protocol to extend the Court's jurisdiction would have been enacted under Article 27; the Protocol was concluded under the provisions of Articles 76 and 104 of the Treaty. In the Bank's view, Article 54 (2) (a) of the Protocol did not in any way add to the nature and type of the Respondents envisaged under Article 30(1) of the Treaty so as to bring the Bank and the Registrar within the purview of the Court's jurisdiction, they being neither Partner States nor Institutions of the Community.
65. Last, but not least, all the Respondents submitted, with one accord, that the conclusion of the Protocol, and in particular Article 54 thereof, did not render inapplicable the Court's previous interpretation of Article 30 of the Treaty in the cases of *Anyang Nyong'o supra and of Modern Holdings Ltd. (supra)*.
66. Having considered the rival submissions, we take the following view of the matter.
67. The Decision of the Trial Court as set out in Paragraphs 37 and 38 above, to wit, that by the plain reading of Article 30 (1) of the Treaty, as well as its interpretation in the cases of *Anyang Nyong'o and of Modern Holdings Ltd (supra)*, the only proper Respondent to References by legal and natural persons under Article 30 of the Treaty are Partner States or Institutions of the Community the legality of whose Acts, regulations, directives, decisions or actions are brought into question, and, accordingly, the Bank and the Registrar were improperly brought before the Court. Therefore, the Trial Court cannot be faulted.
68. We are unpersuaded that the Common Market Protocol extended this Court's jurisdiction ratione personae to legal and natural persons within the Partner States. The reasons are these. First, the provision of Article 27 (2) of the Treaty that 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, and to that end the Partner States shall conclude a Protocol to operationalize the extended jurisdiction, leaves no doubt in our minds that the jurisdiction of the Court can only be extended by a Protocol concluded pursuant to that sub-Article for the specific purpose of extending the Court's jurisdiction. The Common Market Protocol (which was concluded under Articles 76 and 104 of the Treaty), is not such a Protocol; and in no wise does it extend the Court's jurisdiction ratione personae or ratione materiae. Secondly, by dint of Article 31 (1) of the Vienna Convention on the Law of Treaties, a Treaty should be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Adopting that approach, we note that Article 29 of the Protocol provides that Partner States undertake to protect cross border investments and returns of investors of other Partner States within their territories. We also note that Article 54 (2) of the same Protocol provides that Partner States guarantee that any person, whose rights and liberties which are recognized by the Protocol have been infringed, shall have the right to redress, even where the infringement has been committed by persons acting in their official capacity. In short, the obligation or duty to protect cross border investments is on Partner States and the guarantee to provide redress is by the self-same States. It is to our mind axiomatic that the bearer of the duty or obligation and the guarantor of redress – who is the Partner State – is the only proper Respondent to an action (by whatever name called) by a legal or natural person under the provisions of the Common Market Protocol. A challenge against the actions or omissions of public officials acting in their official capacity, must be lodged against the Partner State and not the official (s) concerned. Thirdly, the interpretation of Article 30 of the Treaty in the cases of *Anyang Nyon'go, and of Modern Holdings Ltd (supra)* to the effect that only Partner States or Institutions of the Community are proper Respondents to a Reference there under, has not been implicitly overturned or rendered otiose by the entry into force of the Common Market Protocol.

69. In the result, we answer issue No.1 before this Court in the negative.
Issue No. 2: Whether the Trial Court erred in law in finding that there was no cause of action against the Attorney General of Uganda?

**Appellant's Case**

70. The Appellant adopted its submissions in the Trial Court. It emphasized that its case was not just about the Bank guarantee: It was a case of failure of justice in the Republic of Uganda perpetrated by the Registrar failing to recall the guarantee, the Bank failing to honour the same guarantee, and the Attorney General failing to ensure that it's cross border investment was protected as per Articles 29 and 54 of the Common Market Protocol. The Appellant faulted the various adverse Judgments against it by the courts of Uganda and contended that they exhibited failure of justice. There was, therefore, a cause of action against the Attorney General.

**2nd Respondent's Case**

71. The Attorney General of Uganda submitted that it was evident from the record that the

Bank guarantee formed the substratum of the Reference. The Claimant's grievance was that the Bank failed to honour the guarantee and the Registrar failed to enforce it. The ultimate relief sought was payment of the guaranteed sum. That being so, and it being the case that by the time the First Instance Division decided the Appellant's Reference, the guarantee had ceased to exist (as the Supreme Court of Uganda had set aside the Arbitral Award as well as the Judgments of the High Court and Court of Appeal of Uganda on which the said guarantee was grounded), there was no cause of action against the Attorney General.

**The Court's Determination**

72. Looking at the issue before us holistically, it is clear beyond peradventure that the Appellant's case was an invitation to the Court to address and redress the Appellant's grievance concerning non protection of its cross border investment in Uganda pursuant to the provisions of the Protocol. In short, the subject matter of the dispute was alleged infringement of the Appellant's rights under the Protocol. And so the most critical issue was whether the Court had power to deal with the Common Market complaint presented to it. In other words, whether the Court had *jurisdiction ratione materiae*.

**The Court's J*urisdiction Ratione Materiae***

73. As the rival contentions centred on an interpretation of Article 54 of the Protocol, we shall quote it in extenso. It provides:-

    Article 54 - Settlement of Disputes

    "1. Any dispute between the Partner States arising from the interpretation or application of this Protocol shall be settled in accordance with the provisions of the Treaty.

    2. 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 the 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."

74. The meaning of sub-article 1 is common ground: any Common Market disputes between States shall be settled by reference thereof to the East African Court of Justice.

75. The meaning of sub-article 2 is hotly debated. According to the Appellant, disputes other than inter-state ones may be redressed by the competent judicial, administrative or legislative authorities of a Partner State or any other competent authority. The Appellant contends that the expression "any other competent authority" includes this Court and even the East African Legislative Assembly. To hold otherwise, the Appellant contends, would be absurd as the East African Court of Justice would be excluded from performing an essential role in the integration of the Community,

namely. the settlement of Common Market disputes. In the Appellant's view, a litigant is free to elect the forum in which to lodge its complaint for redress: to wit, either in any of the national bodies or in this Court. The Jurisdiction of this Court in Common Market matters, the Appellant contends, is complementary to that of national institutions. The Respondents, on their part, submit that the expression "any other competent authority" in paragraph (b) of sub-article 2 means a national authority within the State for the reason that the guarantee by the Partner State is in the context of its "Constitution, national laws and administrative procedures" as per the opening words of sub-article 2.

76. We agree with the Respondents' submissions that the marrow and pith of sub- article 2 of Article 54 is that Partner States guarantee that any person whose rights and liberties (as recognized by the Common Market Protocol) are infringed upon by State officials shall have a right to redress by that State's competent judicial, administrative or legislative authority or any other competent authority. We also agree that the phrase "any other competent authority" refers to a national authority howsoever established other than a judicial, administrative or legislative body. Indeed it stands to reason that it is only within national institutions that any Partner State can guarantee the adjudication of disputes by aggrieved persons. The Appellant's contention that "any other competent authority" includes the East African Court of Justice, though attractive, is, accordingly, rejected.
77. Having formed the opinion that the redress of non-inter-state State Common Market complaints was not entrusted to this Court by the Protocol, we are impelled to conclude that the Trial Court lacked *jurisdiction ratione materiae* to entertain the Reference and it should have downed its tools without entering into the issues of the propriety of the parties or the retroactivity of the Common Market Protocol.
78. From the finding that the Trial Court lacked *jurisdiction ratione materiae*, it follows that there could not be a cause of action against the Attorney General of Uganda founded on his alleged omission to see to it that the Claimant's rights under the Protocol were protected.
79. Be that as it may, it is evident that the Trial Court decided Issue No.2 on the rather narrow ground canvassed by the Attorney General that the bank guarantee formed the substratum of the Reference and as the said guarantee had ceased to exist by reason of the Supreme Court of Uganda having set aside the arbitral award as well as the judgments of the High Court and the Court of Appeal on which the guarantee was grounded, there was no cause of action against him.
80. Having considered the arguments on this aspect of the matter, we have arrived at the conclusion that the above Decision of the Trial Court is unimpeachable and should be upheld.
81. In the result, we answer Issue No.2 in the negative.
    Issue No. (3): Whether the Trial Court erred in law in finding that it had no jurisdiction over acts that took place before the coming into force of the Common Market Protocol?

**Appellant's case**

82. The Appellant's case was two pronged. First, the Appellant contended that by dint

of Article 151 (4) of the Treaty which provides that a Protocol becomes an integral part of the Treaty, the Common Market Protocol is an integral part of the Treaty and, accordingly, its provisions are to be deemed to be applicable from 7th July, 2000 when the Treaty entered into force. Secondly, and in the alternative, as the guarantee had not been honoured at the time the Reference was filed, the Appellant had a subsisting cause of action against the Respondents and the issue of retroactive application of the Protocol did not arise.

**Respondents' Case**

83. The Respondents' case was essentiality that there could not be a cause of action founded on acts occurring before the Protocol itself came into force in July 2010. The failure to honour the guarantee was before that date. The Protocol could not be applied retroactively. As regards the contention that the Common Market Protocol gave new life to the Appellant's continuing cause of action, the Respondents' relied on this Appellate Division's decision in *Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, [EACJ Appeal No. 1 of 2011]* where the Court held that the Treaty did not recognize any continuing breach or violation of the Treaty outside the two months after a relevant action came to the knowledge of the Claimant.

**The Court's Determination**

84. Issue No. 3 before this Court, revolves around the Court's jurisdiction ratione temporis.

The Court's Jurisdiction Ratione Temporis

85. Article 30 (2) of the Treaty provides:-

"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."

86. The substance of the provision is that a Reference should be filed within two months of the crystallization of the cause of action or of actual knowledge of its existence by the Complainant.
87. It is not in contention that by the 12th of October, 2009 the Appellant knew that the Bank had refused to pay under the guarantee and, accordingly, the cause of action had arisen. It is also a fact that the Common Market Protocol entered into force on 1st July, 2010. So the issue that cried out for resolution was whether the Protocol could apply to acts or actions that occurred before its entry into force.
88. The substance of the Parties arguments before this Court is set out in Paragraphs 82 and 83 herein.
89. Having considered the rival submissions, we agree with the Respondents' submissions that the Protocol could not be applied retroactively. We reiterate what we said in *Emmanuel Mwakisha Mjawasi & Others vs. The Attorney General of Kenya (supra)* that a Treaty cannot apply retrospectively unless a different intention appears from the Treaty itself or such an intention is otherwise established (see Articles 28 and 29 of the Vienna Convention on the Law of Treaties). We also find the following passage in the Arbitral Award delivered in the Island of Palmas Arbitration quite instructive:-

"A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."

[See Olivier Corten & Pierre Klein (Eds): *The Vienna Convention on the Law of Treaties: A Commentary*, Vol.1, P. 723]

90. In the instant case, the Protocol did not express a different intention. On the contrary, Article 55 of that Protocol is clear that the Protocol shall enter into force upon ratification and deposit of instruments of ratification with the Secretary General by all the Partner States. No clauses are exempted from that general provision. And the Appellant did not establish otherwise an intention by the Partner States that the Protocol would apply retrospectively.
91. As regard the issue of whether failure to honour the guarantee was a continuing cause of action, we reiterate what we held in *Attorney General of Kenya vs. Independent Medical Legal Unit (supra)*, namely, that Article 30(2) of the Treaty does not recognize any continuing breach or violation of a Treaty outside the two months period after a relevant cause of action comes to the knowledge of the Claimant. We reject the Appellant's submission that failure to pay a bank guarantee is a continuous act to which the principle of retroactivity would not apply until all the sums have been paid thereunder. We reject it for the further reason that such a postulation would be tantamount to applying the right of redress in respect of protection of the cross border investments (which are conferred by the Common Market Protocol) to juridical facts (non payment of a bank guarantee) which would not have been a violation of any Treaty or Protocol in force at the time of their occurrence.
92. The upshot of our consideration of this aspect of the matter is that we find the Court lacked jurisdiction ratione temporis. In that connection, we also reiterate what we said in *Emmanuel Mwakisha Mjawasi (supra)*, that:

"Non-retroactivity is a strong objection. When it is upheld, it disposes of the case there and then."

93. In the result, we answer Issue No.3 in the negative.

Issue No. (4): Whether the Trial Court erred in law in holding that issue Nos. 4, 5, 6 and 7 (as framed in the Scheduling Conference) were wholly academic?

94. The issues agreed upon at the trial Court's Scheduling Conference are set out in Paragraph 35 above and need not be repeated in detail. Suffice to state that Issue No. 4 was whether the Reference was time barred under Article 30 of the Treaty; Issue No. 5 was whether Article 54 (2) of the Common Market Protocol extended the jurisdiction of the Court to deal with settlement of cross border investment disputes; Issue No. 6 was whether the Respondents were in breach of Articles 27 and 151 of the Treaty as read with Article 54 of the Common Market Protocol in failing to honour and pay the bank guarantee; and Issue No. 7 was whether the Appellant was entitled to the reliefs sought?

**Appellant's case**

95. The gist of the Appellant's case was that the matters raised in Issues Nos. 4, 5, 6 and 7 were not academic and deserved resolution. In the Appellant's view, the Court by declaring them academic avoided an interpretation of Articles 29 and 54 of the Common Market Protocol which were the core of its case.

**Respondents' case**

96. The Respondents, for their part, took the position that the First Instance Division having found that the Bank and the Registrar were wrongfully brought before the Court and that there was no cause of action against the Attorney General, it followed that there was no Respondent against whom any relief sought by the Appellant could be imposed, and, accordingly, the remaining issues were all academic. The doctrine of mootness as propounded in the *Canadian Supreme Court Case of Borowski vs Attorney General of Canada [1989] S.C.R. 342* was prayed in aid.

**The Court's Determination.**

The doctrine of Academic issues or mootness:

97. We recall that as recounted in Paragraph 53 above, the fourth issue for determination by this Court was whether the Trial Court erred in law in holding that issues nos.4, 5, 6, and 7 (as framed in the Scheduling Conference by the trial Court) would be wholly academic.
98. In the context of this case, the issue is this: in light of the Court having found that (i) the Common Market Protocol could not be applied retrospectively to facts or situations that occurred before the Protocol's entry into force (Issue No. 3); (ii) the Standard Chartered Bank and the Registrar of the Court were improperly joined in the Reference (Issue No. 1); and (iii) there was no cause of action against the Attorney General of Uganda (Issue No. 2), was there still a dispute between the Parties left for decision by the self-same Court? The answer must be an emphatic "No". In the absence of any Respondents from whom the Appellant could be granted the reliefs sought, there was no inter- party dispute for resolution by the Court. The Appellant's case was as dead as the dodo. Any further examination of the matter would have been an academic exercise as the First Instance Division stated.
99. For the sake of completeness, it must be said by this Court that the doctrine of mootness or academic adventure by the Courts of Justice is well known. The raison d'ètre of Courts of Justice is to give binding decisions on live disputes submitted to them by the parties or, where applicable, to render advisory opinions in limited cases where their constitutive Constitutions, Statutes or Treaties so provide. If there is no live dispute for resolution (and there can be none in the absence of contending parties); or the Court is not exercising any advisory opinion jurisdiction it may have, a Court of Justice would be wasting the public resources of time, personnel and money by engaging in a futile and vain exposition of the law. The exposition of the law in the abstract is the province of academics, and not of the Courts of Justice. It is for this that the appellation "academic" is used to characterize such an endeavour.
100. In *Borowski vs. The Attorney General of Canada (supra)*, the Supreme Court of Canada expressed itself in similar vein, as follows:

    "The doctrine of mootness is an aspect of a general policy practice that a Court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the Court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the Court will have no practical effect on such rights, the Court declines to decide the case. This essential ingredient must be present not only when the action

or proceeding is commenced but at the time when the Court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the rights of the parties, the case is said to be moot. The general policy or practice is enforced in most cases unless the Court exercises its discretion to depart from its Policy or Practice."

101. We entirely agree with this postulation of the doctrine. It is totally apposite to the case at hand before us.
102. It follows from what we have stated above that our answer to issue No.4 is in the negative.

Issue No (5): Whether the Trial Court erred in law in failing to award costs to the successful Parties?

**Appellant's Case**

103. The Appellant submitted that the Trial Court was correct in denying costs to the Respondents, and, its reasoning that the Appellant had seriously suffered in the pursuit of justice in the Courts of Uganda, was a good reason for so ordering.

**Respondents' Case**

104. The Respondents, for their part, submitted that there was no good reason given by the Trial Court to deny them costs. They pointed out that they were not parties to the cases in Uganda involving the Appellant. They added that it was unjust to deny them costs when they won in the Trial Court, yet when the Appellant had won in the Appellate Division against the trial Court's ruling on the Preliminary objections, it was awarded costs.

**The Court's Determination**

105. We have carefully considered the rival submissions on the issue submitted for determination. Having done so, we have taken the following view of the matter.
106. Rule 111 (1) of the Court's Rules of Procedure provides as follows:

"Costs in any proceedings shall follow the event unless the Court shall for good reason otherwise order."

107. The question to ask in this Appeal is therefore whether the trial Court exercised its discretion judiciously in declining to give costs to the successful parties.
108. The reason the Trial Court gave for declining to award costs to the Respondents is that the Appellant had been seeking justice for long and was yet to finalize HCCC No. 1255 of 1998 in Uganda which was the original case in the dispute.
109. We agree with the Respondents' submissions that there was no good reason to deny them their costs, and, that the Trial Court exercised its discretion improperly in denying them costs. We do so for the following reasons. First, contrary to the trial Court's holdings, the Appellant was not a party to HCCC 1255 of 1998 in Uganda; the correct party was Alcon International (Uganda). Secondly, even if the Appellant was a party to HCCC1255/98, the record shows that it was NSSF Uganda which had been seeking justice against Alcon International Ltd. It did so by appealing the unfavourable Arbitral Award made against it to the High Court, the Court of Appeal, and eventually the Supreme Court of Uganda, where it succeeded when that Court

set aside the Arbitral Award. Thus the finding that "the Claimant has been seeking justice for long" was based on a misapprehension of the facts on the record before the Court. Thirdly, there was never any finding that the delay in obtaining justice in Ugandan courts was caused by the conduct or omission of the Respondents thus warranting their being deprived of costs to the Reference. Fourthly, the long delay in the Ugandan courts was a consequence of a Party exercising its right of appeal. The exercise of such a right could not, on a proper exercise of discretion, be used as a ground to deny a successful litigant its costs. Indeed to do otherwise would in effect be to fetter the party's undoubted legal right of appeal. Last, but not least, to deny costs on the basis of happenings outside the Reference was tantamount to the Trial Court taking into account irrelevant matters. It was, thus, an improper exercise of judicial discretion.

110. In the above premises, we answer Issue No. 5 in the affirmative.

**Conclusion**

111. The upshot of our consideration of this Appeal and the Cross-Appeals is that:
    (a) The Appeal is dismissed with costs to the Respondents here and below; and
    (b) The Cross-Appeals are allowed with costs to the Respondents.

It is ordered accordingly.

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East African Court of Justice- Appellate Division
Case Stated No.1 of 2014

Arising from Miscellaneous Application No. 558 of 2012

In Civil Suit No. 298 of 2012 of the High Court of Uganda at Kampala- Civil Division

Reference for a Preliminary Ruling under Article 34 of the Treaty made by the High Court of the Republic of Uganda in the proceedings between

**The Attorney General of the Republic of Uganda And Tom Kyahurwenda**

Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; James Ogoola, JA; Edward Rutakangwa, JA; Aaron Ringera, JA
July 31, 2015

*A preliminary ruling is binding erga omnes - Justiciability – The EACJ's interpretation of the Treaty takes precedence over the interpretation by national courts- Uniformity in EAC Treaty interpretation.*

*Articles: 6, 7, 8 , 27, 33 34 and 123 of the Treaty Establishing the East African Community – Rule 76 and the Sixth Schedule of the East African Court of Justice Rules of Procedure 2013.*

On 2nd October 2012, Mr. Tom Kyahurwenda (the Plaintiff), lodged Civil Suit No. 298 of 2012 in the High Court of the Republic of Uganda against the Attorney General of the Republic of Uganda (the Defendant), in which he averred that the actions of the Defendant in the set of facts presented before the High Court amounted to a breach of Articles 6, 7, 8 and 123 of the EAC Treaty for which he suffered pecuniary and non-pecuniary loss. The Plaintiff submitted that the Defendant was liable for the misconduct of its officers and sought: compensation for the breach and consequent injury, loss and damage; and; the institution of mechanisms to deter a repeat and recurrence of similar acts, commissions and omissions of and non-compliance of the EAC Treaty by State by agents, workers, officials and servants of the Government of Uganda.

The Defendant questioned the jurisdiction of national courts to adjudicate cases relating to Treaty interpretation and to award compensation contending that they were not justiciable. The matter was therefore referred to the Court for a preliminary ruling.

**Held:**

1) While Article 34 of the Treaty for the Establishment of the East African Community grants the EACJ exclusive jurisdiction to interpret the Treaty and to invalidate Community Acts, national courts and tribunals are entitled to entertain matters

involving the violation of the Treaty and the application of the provisions of the Treaty within the context of Articles 33 and 34. Where a breach is established, it is for the national courts to determine whether there was damage, and what reliefs and remedies are justifiable and commensurate with the loss. However, if a national court or tribunal considers an interpretation of the Treaty to be necessary, then it has no option but to refer the question to the EACJ. Hence, the discretion is narrow and confined to determining whether or not a ruling on the question is necessary to enable the court to make its judgment.

2) Decisions of this Court in the interpretation of the Treaty take precedence over decisions of the national courts and tribunals on similar matters.
3) The fundamental objectives and operational principles of the Treaty in Articles 6,7 and 8 , which are solemn, sacred and sacrosanct, are justiciable before the national courts and tribunals of the Partner States.
4) However, Paragraphs 2, 3 and 4 of Article 123 of the Treaty remain inoperative and are not justiciable both before this Court and before the national courts and tribunals.
5) The decision as to the costs of this Preliminary Ruling and the appropriate remedies is a matter for the High Court of the Republic of Uganda to pronounce in the context of the proceedings in the suit before the High Court.

**Cases cited:**

Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, EACJ Appeal No. 1 of 2012

Attorney General of Uganda v. Omar Awadh and 6 Others, EACJ Appeal No.2 of 2012

Bulmer v. Bollinger,[1974] CA

East African Law Society v. The Secretary General of the East African Community

Foto-Frost v Hauptzollamt-Ost (Case 314/85 [1987] ECR 419]

James Katabazi & 21 Others v. The Secretary General & the Attorney General of Uganda, EACJ Ref. No. 1 of 2007

Kasikili Sedudu Island (Botswana/ Namibia), ICJ Reports 1999, p. 1059, para. 108

Pretore di Salo v. Persons Unknown, Case 14/86 [1987] ECR 2545

Samuel Mukira Mohochi v. The Attorney General of Uganda, EACJ Reference No. 5 of 2011

Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia, Malaysia), Judgment, ICJ Reports 2002, p. 625

Territorial Dispute (Libyan Arab Jamahiriya /Chad), Judgment, ICJ Reports 1994, pp. 21-22, para. 41;

Van Gend Loos [1963] CMLR 105

## Preliminary Ruling

**Introduction**

1. The present Preliminary Reference arose out of a Miscellaneous Application before the High Court of the Republic of Uganda ("the High Court") arising from Civil Suit No. 298 of 2012 between Tom Kyahurwenda and The Attorney General of Uganda. The High Court stayed the proceedings pending the preliminary ruling of the East

African Court of Justice ("the Court").

2. On 2nd October 2012, Mr. Tom Kyahurwenda ("the Plaintiff"), lodged the above civil suit against the Republic of Uganda ("the Defendant"), in which he averred that the actions of the Defendant in the set of facts presented before the High Court were a breach of Articles 6, 7, 8 and 123 of the Treaty Establishing the East African Community (hereinafter called "the Treaty).
3. As a result, the Plaintiff sought, among others an Order of enforcement of the provisions of the EAC Treaty and of the EAC Act 13/2002, and of the state obligations of the Republic of Uganda through redress of the Plaintiff's injury, loss, and damage consequent upon the breach of, and non-compliance with the Treaty and the EAC Act. In this regard, the Plaintiff prayed for the following specific reliefs :
   a) An Award of adequate compensation and atonement for the breach and consequent injury, loss and damage; and
   b) Institution of measures and mechanisms to deter a repeat and recurrence of similar acts, commissions and omissions of breach and non-compliance of the EAC Treaty and EAC Act by State agents, workers, officials and servants of the Government of Uganda.
4. On 6th December 2012, the Attorney General of Uganda, made an application for Orders that:-
   a) The High Court "be pleased to make a declaration that in the circumstances of the case the court has no jurisdiction over the Defendant in respect of the subject matter of the claim or the relief or remedy sought by the Plaintiff in the action."(sic)
   b) Or, in the Alternative, the High Court "be pleased to issue an order transmitting the following questions certified as a Case Stated requesting the East African Court of Justice to give a preliminary ruling on:
      i) Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 are justiciable in the National Courts of Partner States; and,
      ii) Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty confer sufficient legal authority on the National Courts of Partner States to entertain matters relating to Treaty violations and award compensation and/or damages against a Partner State.
5. On 17th November, 2014, the High Court of Uganda, by means of a Consent Order, referred to the East African Court of Justice, for a preliminary ruling the following two questions:
   a) Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 are justiciable in the National Courts of Partner States; and,
   b) Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are self-executing and confer sufficient legal authority on the National Courts of the Partner States to entertain matters relating to Treaty violations and to award compensation and/or damages as against a Partner State.
6. In accordance with the Sixth Schedule provided for in Rule 76 of the East African Court of Justice Rules of Procedure 2013 ("Court Rules"), the Preliminary Reference from the High Court was notified by the Registrar of this Court to the Parties to the Civil Suit, to all the Partner States, and to the Secretary General of the East African

Community ("the Secretary General").

7. Pursuant to subsection (3) of the Sixth Schedule of the Court Rules, written observations were submitted to the Court by the United Republic of Tanzania, the Republic of Uganda, the Republic of Kenya and the Secretary General.
8. As per subsection (4) of the Sixth Schedule, the written observations were served on the Parties, all the Partner States and the Secretary General.
9. At the hearing, on 24th May, 2015, the oral observations of the Republic of Kenya, the United Republic of Tanzania, the Republic of Uganda, and the Secretary General were entertained. The Republic of Kenya, sought from the Court, permission to submit a supplementary written observation. The Court granted the permission for the submission within a prescribed time. The Republic of Kenya submitted the supplementary written observations.

**Arguments and observations of the participants**

**a) The First Question**

10. The Republic of Uganda posits that the starting point is determining whether the national courts ne have interpretative jurisdiction over the EAC Treaty.
11. The Republic of Uganda contends that the national courts do not have interpretative jurisdiction over the EAC Treaty. Uganda asserts that "interpretation of the Treaty is a preserve of this Court (the EACJ) unless where the Treaty has conferred such a jurisdiction to the organ of the Partner State".
12. Uganda contends that Article 27 of the Treaty is "instructive on this matter". Uganda further maintains that it was not the intention of the framers of the Treaty to confer interpretative jurisdiction on the national courts.
13. Furthermore, Uganda argues that the *raison d'etre* of Article 34 of the Treaty is to allow national courts to entertain matters that concern enforcement of the Treaty, but not interpretation, which falls under the sole purview of the East African Court of Justice.
14. The Tanzanian Government deemed it necessary to undertake a review of Articles 6, 7, 8 and 123 reading them together with Article 27 and Article 33 and came up with a conclusion similar to that of Uganda that it is only the East African Court of Justice which has the sole mandate of interpreting the Treaty.
15. The Kenyan Government delved in detail to define the term "justiciable" for purposes of question one. Kenya relied on *Black's Law Dictionary* which defines "justiciability" as "proper to be examined in courts of justice". Kenya further relied on the same dictionary to define "justiciable controversy" as "a controversy in which a claim or right is asserted against one who has an interest in contesting it" or "a question as may properly come before a tribunal for decision".
16. Kenya has also availes to the Court case law which has sufficiently dealt with the issue of "justiciability". In *Patrick Ouma Onyango & 12 Others v the Attorney General & 2 Others, Misc. App. No. 677 of 2005*, the High Court of Kenya endorsed the doctrine of Justiciablity as stated by Lawrence H. Tribe in his book entitled «*American Constitutional Law, 2nd Edition*», p. 92 that:-

    In order for a claim to be justiciable…, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted…

Finally related to nature of the controversy is the 'political question' doctrine, barring decisions of certain disputes best suited to resolution by other government actors.

17. Kenya also ventures into the long-standing debate on the applicability of international law vis-à-vis the monist and dualist legal systems and concludes that different Partner States embrace different legal systems and that the Court should determine applicability of the Treaty on the basis of the type of legal system.
18. Kenya finally concludes that generally speaking the Treaty for the East African Community is justiciable before her national courts.
19. However, Kenya contends that it is "imperative to consider the contents of specific Articles raised to ascertain whether they are justiciable before national courts." Kenya opines that Articles 6, 7, and 8 of the Treaty play important functions "because they are indicators of Partner States' compliance with the integration agenda" and that "they impose upon Partner States an obligation to adhere to them failing which the integration would not be possible". Kenya further maintains that the above Articles 6, 7 and 8 should be treated under the "political question" doctrine "which bars the National Courts from rendering decisions on the same and it is best suited to resolution by other governmental actors as it is hinged upon political will and formulation of policies by the Partner States".
20. Kenya, hence, concludes that "provisions of Articles 6, 7, 8, and 123 read together with Articles 27 and 33 of the Treaty are not justiciable in the National Courts of Partner States".
21. In her supplementary submission, Kenya maintains that generally speaking the Treaty is justiciable in her National Courts. Kenya submits that Article 34 of the Treaty establishes a preliminary procedure mechanism "through which national courts of member states can refer matters touching on the interpretation and application of the Treaty on validity of Community regulations and undertakings for interpretation to the East African Court of Justice."
22. Kenya further posits that "national courts in their own right thus occupy a central place in the integration process" and that "through adjudication of disputes arising from Partner States… national judiciaries complement the EACJ's role in maintenance of the rule of law within the Community generally; a vital ingredient to the success and sustainability of the integration process", hence, "the effectiveness of the EACJ, therefore, to a great extent depends on its relationship with the national courts."
23. Kenya also illustrates through a comparative approach, the similarities of the preliminary reference mechanism in the European Community Treaty and in the EAC Treaty, and concludes that Community laws are justiciable before national courts of Partner States.
24. The Secretary General submits that it is clear that Article 27 vests the East African Court of Justice with jurisdiction to interpret and apply the Treaty. The Secretary General furthermore maintains that the EACJ has on several occasions held that Articles 6, 7, and 8 are justiciable. In support of his position, the Secretary General cites the following cases: *James Katabazi and 21 Others v. Secretary General of the East African Community and the Attorney General of Uganda, EACJ Reference No. 5 of 2007, Samuel Mukira Mohochi v. Attorney General of Uganda, EACJ Reference No. 5 of 2011, Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, EACJ Appeal*

*No. 1 of 2012 and Attorney General of Uganda v. Omar Awadh and 6 Others, EACJ Appeal No.2 of 2012)*.

25. The Secretary General considers that Article 33(2) which provides that "decisions of the Court (EACJ) on the interpretation and application of the Treaty shall have precedence over decisions of national courts on similar matter", is illustrative of the fact that national courts can entertain cases "involving interpretation and application of the Treaty with the caveat that should a decision of the EACJ conflict with the decision of a national court on a similar matter of interpretation or application of the Treaty, the decisions of the EACJ shall prevail".
26. The Secretary General takes the view that Article 34 of the Treaty entitles national courts to interpret and apply the Treaty. The Secretary General further opines that Article 34 provides national courts discretion on whether to make a preliminary reference or not due to its wording "if it considers that a ruling on the question of interpretation or application of the Treaty is necessary to enable it to give judgment."
27. In as far as Article 123 of the Treaty is concerned, the Secretary General holds that the Article is neither justiciable before national Courts nor before the East African Court of Justice. This is due to the fact that its Paragraph 5 provides for its operationalisation when the Council "prescribes in detail how the provisions of the Article shall be implemented". In other words, the Article spells out the objectives that will form part of the common foreign and security policies.

**Second Question**

28. As earlier pointed out, Uganda did not dwell on answering the questions as stated but preferred to inquire whether national courts possessed interpretative jurisdiction of the Treaty and concluded that they did not have the jurisdiction.
29. Tanzania posits that the applicability of the Treaty largely depends on the extent to which it has been domesticated in a given Partner State. According to Tanzania, Treaties, including the EAC Treaty, are not self-executing in her jurisdiction, unless an Act of Parliament makes them operative.
30. Kenya, submits that the second question was similar to the first question and that the submissions for the first question are relevant to the second question.
31. The Secretary General also holds that the answers to the first question are similar to the answers to the second question.
32. On the issue of the possible award of compensation, the Secretary General points out:-

    '[i]t is trite law that compensation is always awarded by courts against established damages suffered by the beneficiary of such compensation. Compensation is also awarded by measuring the amount of suffering or loss endured by its beneficiary. Needless is to mention that this Honourable Court (the EACJ) has had, at the end of substantive litigation over interpretation and application of the Treaty, several occasions where compensation against losses and costs was awarded. This Court (the EACJ) has also had an occasion where it refused to award an application for interim injunction basing its argument on the fact that the applicant had failed to prove that the pre-empted injury to reputation could not be compensated by money (See *Rt. Hon. Margaret Zziwa v. Secretary General of the East African Community, EACJ*

*Application No. 23 of 2014 arising out of Reference No. 2 of 2013*).
Similarly, national Courts, at the end of a litigation process that has involved interpretation and application of Community laws, may award compensation to a person that has suffered damage or injury as a result of violation of those laws by a Partner State'.

**The Court's Analysis And Findings**

33. The Court is mindful of the fact that it has on several occasions had an opportunity to apply rules of the Vienna Convention of 1969 on the Law of Treaties in interpreting the provisions of the EAC Treaty. The rules of interpretation of the Vienna Convention that the Court has resorted to in case of interpretation of the EAC Treaty provisions are Articles 31 and 32 of the Convention. The Articles provide:-
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 term 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.
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 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.
   Article 32:

**Supplementary means of interpretation**

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm meaning resulting from the application Article 31, or determine the meaning when the interpretation according to Article 31:
   (a) Leaves the meaning ambiguous or obscure; or,
   (b) Leads to a result which is manifestly absurd or unreasonable.

The Court has not lost sight of the indisputable fact that Art. 31 and 32 of the Vienna Convention reflect pre-existing customary international law and can be applied as valid canons of interpretation to treaties such as the EAC Treaty. (See, also *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, pp. 21-22, para. 41; Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia, Malaysia), Judgment,*

*ICJ Reports 2002, p. 625 at pp. 645- 46, paras 37-8; Case Concerning Kasikili Sedudu Island (Botswana/ Namibia), ICJ Reports 1999, p. 1059, para. 108*.

34. Armed with the above review of the well established canons of interpretation of international treaties, the Court deems it necessary to dwell upon the broad and fundamental question posed by Uganda, whether the national courts have interpretative jurisdiction over the EAC Treaty, as a precursor to the specific questions posed in the Preliminary Reference by the High Court of Uganda. In other words, this Court will be answering the question by what court(s) is the Treaty to be interpreted?
35. In the present case, Uganda holds that the existence of Article 34 of the Treaty which provides for the preliminary reference mechanism read together with Article 27 and Article 33 of the same Treaty must be construed as only affording national courts the power to entertain matters that concern enforcement of the Treaty ; and bars the national Courts from interpreting the Treaty, which is the sole preserve of the EACJ. Tanzania also agrees with this position. The relevant parts of the above provisions are worded as follows:

**Article 27**

**Jurisdiction of the Court**

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 jurisdiction conferred by the Treaty on Organs of Partner States.
2. …

**Article 33**

**Jurisdiction of National Courts**

1. Except where jurisdiction is conferred on the Court by this Treaty, disputes to 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 the Treaty shall have precedence over decisions of national courts on a similar matter.

**Article 34**

**Preliminary Rulings of National Courts**

Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions 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 matter.

36. The Court considers, first of all, that Article 27 of the EAC Treaty establishes a broad and general jurisdiction of this Court. There is nothing in that Article which purports to grant a monopoly of the interpretation jurisdiction to the EACJ, at the exclusion of any other entity including the national courts.
37. The Court observes that on the face of it, Article 33 (2), which provides that "Decisions of the Court on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter", appears to

suggest that both the national courts and the EACJ do indeed possess the jurisdiction to "interpret and apply" the Treaty. This provision reinforces the view taken by the Secretary General that the Treaty, does not, in any way, afford the EACJ monopoly over its "interpretation" and "application". For why else would the Treaty establish a hierarchical order of precedence of decisions made by the national courts and the EACJ in the realm of its interpretation and application on "a similar matter"?

38. In order to answer the question, by what courts is the treaty to be interpreted? the Court deems it important at this juncture to examine the meaning and purpose of Article 34 of the Treaty which provides for the mechanism of the "preliminary reference".
39. Article 34 shows that if "a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall"… The departure point is that a question has to be raised before "any court or tribunal" and not any other entity. In determining what "any court or tribunal" is, for purposes of the mechanism of preliminary reference, the Court draws inspiration from the jurisprudence of the European Court of Justice [« ECJ »], which is also in possession of the mechanism. In the *Pretore di Salo v. Persons Unknown*, the ECJ held that it:

    '[h]as jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature. (see, *Case 14/86 [1987] ECR 2545*)'.
40. Inspired by the above ruling, this Court opines that for a national to be considered a "court or tribunal" for purposes of preliminary reference, the entity should possess the following attributes: established by law; have permanent existence; endowed with compulsory jurisdiction; have ability to entertain procedures inter partes; apply rules of law; and, be endowed with functional independence.
41. Article 34 of the Treaty further provides that where a court or tribunal is faced with "… the interpretation or application of the provisions 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 matter". The provision uses the emphatic word "shall". In the general scheme of legal drafting, the use of the word "shall"would presuppose that when the national courts or tribunals are faced with a question of interpretation, application or validity, they have no option, but to refer the matter to this Court.
42. However, the use of the phrase in Article 34 of the Treaty, "…if it considers it necessary that a ruling on the question is necessary to enable it to give judgment…" would appear to give credence to the view held by both the Secretary General and Kenya that the national courts or tribunals have "a wide margin of appreciation", to decide whether or not to refer the matter to this Court for interpretation and application of the Treaty.

43. It is incumbent upon this Court to determine the scope of discretion afforded to national courts and tribunals in Article 34.
44. The Court observes that in the absence of the phrase "if it considers it necessary", and with the use of the emphatic word "shall", then it would have been clear that the national courts and tribunals would have had no discretion whatsoever but to refer to this Court all matters of interpretation and application of the Treaty and validity of regulations, directives, decisions and actions of the Community. In that event, the logical question to pose would then be: what is the nature of the discretion introduced by the above phrase, if it considers it necessary? In answering that question, the Court finds guidance in the meaning and application of a similar provision which introduces the identical mechanism of preliminary reference in the European Community (EC) Treaty; and which was one of the major reference points when developing the EAC Treaty. Article 234 of the EC Treaty provides that:
    Article 234
    The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
    (a) the interpretation of this Treaty;(b) the validity and interpretation of acts of the institutions of the Community...;(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
    Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
    Where any such question is raised in a case pending before a court or tribunal of a member state, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.
45. The Court notes that despite the similarities in the approach towards the mechanism of preliminary reference in both the EAC and the EC Treaties, Article 34 of the EAC Treaty is distinguishable from Article 234 of the EC Treaty in certain aspects. Article 234 of the EC Treaty makes a distinction where a question of interpretation and validity is raised before lower courts and before the courts of last resort in any given matter.
46. In the famous case of *Bulmer v. Bollinger*, Lord Denning, M.R. stated in reference to the then Article 177 (now 234 of the EC Treaty):
    '[T]hat Article shows that, if a question of interpretation or validity is raised, the European Court is supreme. It is the ultimate authority. Even the House of Lords has to bow down to it. If a question is raised before the House of Lords on the interpretation of the Treaty- on which it is necessary to give a ruling- the House of Lords is bound to refer it to the European Court. Art 171(3) uses the emphatic word "shall". The House has no option. It must refer the matter to the European Court, and having done so, it is bound to follow the ruling in that particular case in which the point arises'.
    In as far as the lower courts are concerned, Lord Denning, M.R., in the same case above opined:
    'But short of the House of Lords, no other English Court is bound to refer a question to the European Court at Luxembourg. Not even a question on the interpretation of

the Treaty. Art. 177(2) uses the permissive word "may" in contrast to "shall" in Article 177(3). In England, the trial Judge has complete discretion. If a question arises on the interpretation of the Treaty, an English Judge can decide it for himself. He need not refer it to the Court in Luxembourg unless he wishes'.

47. On its part, Article 34 of the EAC Treaty, does not make any form of distinction between the hierarchy of national courts and tribunals. It lumps all the "courts and tribunals" together in the phrase "any courts or tribunals". Furthermore, the drafters of the Article opted to use the compulsive word "shall", rather than the permissive word "may". The questions that come to the mind of the Court are two: what intention did the framers of the EAC Treaty habour in opting for the use of the emphatic "shall", rather than the permissive "may"? and, what is the extent of the discretion conferred on national courts in Article 34 of the EAC Treaty?
48. It is of utmost importance to understand the significance of the preliminary ruling procedure. The procedure is the keystone of the arch that ensures that the Treaty retains its Community character and is interpreted and applied uniformly with the objective of its provisions having the same effect in similar matters in all the Partner States of the East African Community. In the absence of this procedure, it is possible that legions of interpretation of the same Treaty would emerge drifting hither and thither, aiming at nothing. This would at best create a state of confusion and uncertainty in the interpretation and application of the Treaty ; and at worst, ignite an uncontrolled crisis which would destabilise the integration process. The situation could even be more disastrous were national courts and tribunals permitted to declare Community Acts, regulations, directives and actions invalid in the absence of a ruling to that effect by the East African Court of Justice.
49. In this vein, the ECJ, in Preliminary Ruling of *Foto-Frost v Hauptzollamt-Ost (Case 314/85 [1987] ECR 419]*, held that even though Article 234 did not settle the question of whether national courts have the jurisdiction to invalidate a Community Act, the requirement of uniformity, which is the purpose of Article 234 is of particular imperative when the validity of a Community Act is at issue. The ECJ stated that:
'Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty'.
50. The Court holds that by resorting to the use of the word "shall" in Article 34 and having regard to the *raison d'etre* of the preliminary ruling procedure expounded above, it was the intent and purpose of the framers of the Treaty to grant this Court the exclusive jurisdiction to entertain matters concerning interpretation of the Treaty and annulment of Community Acts.
51. The Court deems it important to distinguish the application of the Treaty from interpretation of the same as found in Article 34. Whereas, as we held above, interpretation is the preserve of this Court, the same is not necessarily the case for the application of the Treaty by the national courts to cases before them. It would defeat the purpose of preliminary reference mechanism if the Court's interpretation of Article 34 of the Treaty extended to "application of treaty provisions". The purpose for the mechanism is for the national courts to seek interpretation of the Treaty provisions in order that they may then apply them to a case at hand. Hence, to interpret Article 34

as requiring "application of the Treaty provision" to be excluded from the purview of national courts would "lead to a result which is manifestly absurd or unreasonable". In this regard, Article 32 (b) of the Vienna Convention on the Law of Treaties cited above acknowledges an absurdity exception to the literal interpretation of any Treaty.

52. The national courts seek interpretation from this Court in order to be empowered to apply the Treaty provisions to the facts of the case (s) before them.
53. Indeed, in the *East African Law Society v. The Secretary General of the East African Community*, the First Instance Division of this Court held that:
    As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impractical if their national courts had no jurisdiction over disputes arising out of implementation of the Protocol. Indeed, Community law would be helpless if it did not provide for the right of individuals to invoke it before national courts.
    This view is fortified by the Decision of the Court of Justice of the European Union in *Van Gend Loos [1963] CMLR 105* where the Court held that:
    [t]he fact that Article 169 and 170 of the EEC Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not deprive individuals of the right to plead the same obligations, should the occasion arise, before a national court.
54. This Court agrees with the postulation of the law by the First Instance Division of this Court that it would be absurd if national courts and tribunals were to be excluded from the application of Treaty provisions should the occasion arise before them.
55. The other fundamental question that requires the attention of this Court is: What is the extent of discretion conferred upon national courts by Article 34 of the Treaty?
56. As we understand it, the discretion afforded to national courts by Article 34 is the discretion to refer or not to refer a question of interpretation to this Court. However, the condition precedent to the exercise of this discretion is this: "if the national court or tribunal considers that a ruling on the question is necessary to enable it to make a judgment…" Once a national court or tribunal considers an interpretation to be necessary, then it has no option but to refer the question to this Court. Hence, the discretion is narrow. It is confined to determining whether or not a ruling on the question is necessary to enable the court to make its judgment.
57. The Court is of the view that the discretion to determine whether a question is necessary or not will in the great majority of cases be exercised in favour of the ruling on the question being necessary, unless: the Community law is not required to solve the dispute (an irrelevant question); or, this Court has already clarified the point of law in previous judgments (*Acte eclair*); or, the correct interpretation of the Community law is obvious (*Acte clair*).
58. This Court deems it apposite to draw attention to two points of fundamental importance. The first fundamental point is that this Court's preliminary ruling is binding on the national court or tribunal which has sought a preliminary ruling. The second fundamental point is that a preliminary ruling is binding *erga omnes* (towards all). It is *erga omnes* in the sense that it is binding on all national courts and tribunals in all Partner States of the Community.
59. Thus far, the Court has held that Article 34 of the Treaty confers on this Court the

exclusive jurisdiction to interpret the Treaty and to annul Community Acts. Now, the Court will turn to the task of unveiling the intention of the framers of the Treaty when they provided in Article 33 (2) that "Decisions of the Court on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter", which appears to suggest that the national courts and the EACJ possess jurisdiction to "interpret and apply" the Treaty concurrently.

60. The only logical conclusion from a reading Article 33 (2) together with Articles 27 and 34 would be that the framers of the Treaty envisaged a situation where it is possible to contract out of the general norm of granting exclusive jurisdiction of interpretation of the Treaty to this Court; and to give instead, concurrent jurisdiction of interpretation on a given subject matter to both this Court and the national courts. In such case, the interpretation of this Court takes precedence.
61. Consequently, this Court concludes from the above that:
    i) Reading Articles 27, 33 and 34 of the Treaty together, this Court has exclusive jurisdiction on the interpretation of the Treaty and invalidation of the Community Acts, directives, regulations or actions;
    ii) The preliminary rulings of this Court are binding on all national courts and tribunals of all Partner States of the Community;
    iii) The purpose of a preliminary ruling is to enable national courts to apply this Court's interpretation to the facts of a case before a national court; and to enable that court to make a judgment;
    iv) If the Partner States have decided to contract out of the above general principle and accord concurrent jurisdiction in the Treaty to both this Court and the national courts and tribunals, the interpretation of this Court takes precedence over that of the national courts and tribunals on similar matters.
62. The Court now comes to the two questions referred to it by the High Court of Uganda. The first question raised is: Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are justiciable in the national courts of Partner States.
63. The Court notes that, Article 6 provides for the Fundamental Principles of the Community, Article 7 provides for the Operational Principles of the Community, and Article 8 provides for the General Undertaking as to the Implementation.
64. Throughout the ever expanding web of the Court case law one golden thread is always to be seen, the Court has held that the principles espoused by Article 6, 7, and 8 are justiciable. In *Samuel Mukira Mohochi v. The Attorney General of Uganda (EACJ Reference No. 5 of 2011, Judgment, 17 May 2013*), the First Instance Division of this Court rejected the argument by the Respondent that the principle of good governance provided for in Article 6(d) of the Treaty represents "aspirations and broad policy provisions for the Community which are futuristic and progressive in application". The Division held that the EAC Partner States intended the Article to entail "actionable obligations, breach of which gives rise to infringement of the Treaty". The Division further held that "the framers of the Treaty went beyond stating the principle and instead negotiated and agreed upon a specific minimum set of requirements that constitute the good governance package". The Division also held that:

'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'.

The Court is persuaded by the above elucidation of the law by the First Instance Division and affirms it.

In the same vein was the case of *James Katabazi and 21 others v. The Secretary General and the Attorney General of Uganda (EACJ Reference No. 1 of 2007, Judgment of 1st November 2007*). The subject matter of that case was an infringement of Articles 7(2), 8(1) and 6 (d) of the EAC Treaty and an infringement of Article 29 of the said Treaty by the intervention on the High Court premises of armed security agents of Uganda to prevent execution of a lawful court order. This Court held that: "the intervention by armed security agents of Uganda to prevent execution of a lawful court order violated the principle of the rule of law and consequently contravened the Treaty". (See also, *Attorney General of the Republic of Rwanda v. Plaxeda Rugumba, EACJ Appeal No. 1 of 2012 and Attorney General of Uganda v. Omar Awadh and 6 Others, Appeal No.2 of 2012*). We reaffirm this postulation of the law.

65. Certainly, the designers of the Treaty contemplated Articles 6, 7 and 8 as forming the fundamental and paramount Objectives, Principles and law of the Community. The preamble to the Treaty fortifies this view. It states:-

[A]nd Whereas the said countries, with a view to strengthening their co-operation are resolved to adhere themselves to the fundamental and operational principles that shall govern the achievement of the objectives set herein…

The Court is cognisant of the fact that a preamble is not binding in law. However, it forms a vital tool for the interpretation of the context and purpose of a Treaty provision (see Article 31 (2) of the Vienna Convention on the Law of Treaties, cited above). In other words, the section of the preamble cited above unequivocally provides that the Partner States have agreed to be bound by the Fundamental and Operational Principles which are to be found in Articles 6, 7 and 8 of the Treaty. Failure to do so constitutes a breach of the Treaty and an impediment to the achievement of its objectives.

66. This Court agrees with and affirms the view of the First Instance Division in the *Mukira Case (supra)* that the stiff penalties established in Articles 146 (1) and 147 (2) of the Treaty for any Partner State which, "fails to observe and fulfil the fundamental principles and objectives of the Treaty" or which grossly and persistently violates the "principles and objectives of the Treaty" is cogent evidence of the intention of the designers of the Treaty to make binding the provisions which articulate the principles and objectives of the Treaty, especially Articles 6 and 7; and to make their violation a breach of the Treaty.
67. The *chapeau* of Article 6 provides: [T] he fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: The use of the emphatic word « shall » is evidence that the designers of the Treaty intended Article 6 to be binding on Partner States. The same can be said of the *chapeaus* of Article 7 and Article 8.
68. These Fundamental Objectives and Fundamental Operational Principles of the

Treaty are just that: truly fundamental- solemn, sacred and sacrosanct. They are the rock foundation, upon which the solid pillars of the Treaty, the Community and the Integration agenda are constructed. They stand deeper, larger and loftier than "mere aspirations" that certain counsel for Partner States would make them out to be.

69. The Court, therefore, holds that Articles 6, 7 and 8 are justiciable both before this Court and before the national courts and tribunals.
70. As for Article 123 of the Treaty, even though it uses the imperative word "shall" in certain of its provisions, which normally denotes "must" or "binding" in legislative drafting its operativeness is partly, circumscribed by Article 123 (5).
71. Article 123 (5) provides: [T]he Council shall determine when the provisions of paragraphs 2, 3 and 4 of this Article shall become operative and shall prescribe in detail how the provisions of this Article shall be implemented. To the best of the knowledge of this Court, there is no such determination as yet.
72. The Court, therefore, holds that paragraphs 2, 3 and 4 of Article 123 are not operative yet; and, hence, not justiciable either before this Court or before the national courts or tribunals.
73. The second question is: Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are self-executing and confer sufficient legal authority on the national courts of the Partner States to entertain matters relating to Treaty violations, and to award compensation and/or damages as against a Partner State?
74. The Court is fully satisfied that the answers to the first question are relevant to the first part of the second question posed in *paragraph 73 (supra)*. The Court has held that Articles 6, 7 and 8 of the Treaty are justiciable before national courts. Accordingly, those Articles do confer legal authority to the national courts of the Partner States to entertain allegations of their violation. However, the same cannot be said of Paragraphs 2, 3 and 4 of Article 123 of the Treaty which is yet to be operationalised.
75. What remains then is whether compensation and/or damage can be awarded by national courts and tribunals against a Partner State that breaches Treaty provisions. This Court is of the view that national courts and tribunals are entitled to examine the facts of each case as against the Treaty provisions in order to determine whether or not there is a breach. Where a breach is established, it is for the national courts to determine whether there was damage, and what reliefs and remedies are justifiable and commensurate with the loss.

**Costs**

76. The costs incurred by the Secretary General and the Partner States which have submitted their observations to the Court in this Preliminary Reference are not recoverable. As these proceedings, in so far as the Parties to the suit are concerned, are a step in the action before the High Court of Uganda, the decision as to costs is a matter for that Court to pronounce in the context of the proceedings before it.
77. For these reasons,

    The Court Hereby Rules That:

    a) Article 34 of the Treaty for the Establishment of the East African Community grants this Court exclusive jurisdiction to interpret the Treaty and to invalidate

Community Acts.

b) National courts and tribunals are entitled to entertain matters involving the violation of the Treaty and the application of the provisions of the Treaty within the context of Articles 33 and 34.
c) Decisions of this Court in the interpretation of the Treaty take precedence over decisions of the national courts and tribunals on similar matters.
d) Articles 6,7 and 8 of the Treaty are justiciable before the national courts and tribunals of the Partner States.
e) While they remain inoperative, Paragraphs 2, 3 and 4 of Article 123 of the Treaty are not justiciable both before this Court and before the national courts and tribunals.
f) The decision as to the costs in this Preliminary Ruling and as to the appropriate remedies is a matter for the High Court of the Republic of Uganda to pronounce in the context of the proceedings in the underlying suit before the High Court.

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East African Court of Justice – First Instance Division
Reference No. 1 of 2014

**East Africa Law Society And The Attorney General of the Republic of Burundi and the Secretary General of the East African Community**

Isaac Lenaola, DPJ; Faustin Ntezilyayo J; Monica. Mugenyi, J
May 15, 2015

*Cause of action – Disbarment from the Roll of Advocates, Burundi Bar Association - Due process of law - The Secretary General's investigative responsibilities – Right to a fair trial - Travel restrictions- Whether the 2nd Respondent neglected his responsibilities under the Treaty.*

*Article: 6(d), 7(2), 29(1) and 71(1)(d) of the Treaty for the Establishment of the East African Community- Burundi Laws: No.1/12 of 18th April 2006 ; Law No. 1/10 of 03rd April 2013- The Revised Criminal Procedure Code; Law No. 1/014 of 29th November 2002 and Law No. 1/05 of 22nd April 2009, the Revised Penal Code*

The Applicant is a membership organization comprising individual lawyers and six Law Societies from East Africa including the Burundi Bar Association. On 24th July 2013, Mr. Rufyikiri, President of the Burundi Bar Association wrote a letter to the Governor of Bubanza Province in Burundi and the subject of the said letter read as "Litigation between Masenge Venant and the Government of Burundi: warning.". In response - the Prosecutor General of the Court of Appeal of Bujumbura, by his letter Ref.: No.552/11/1584/2013 of 07th October 2013, filed a complaint against Mr. Rufyikiri to the Bar Council of the Burundi Bar Association and requested that the Council should take disciplinary measures against Mr. Rufyikiri.

On 30th October 2013, the Prosecutor General requested the Bar Council of the Court of Appeal of Bujumbura to disbar Mr. Rufyikiri from the Roll of Advocates because declarations made at a press conference which the 1st Respondent claimed to be against State security and public peace on 29th October 2013. Mr Rufyikiri had discussed the rule of law, democracy and constitutionalism,

On 28th January 2014, the Court of Appeal of Bujumbura disbarred Mr. Rufyikiri from the Roll of Advocates with immediate effect. On 16th June 2014, the Review Chamber of the Supreme Court of Burundi ruled against Mr. Rufyikiri's review and maintained the decision of the Court of Appeal of Bujumbura.

On 23rd December 2013, Mr. Rufyikiri informed the Applicants that he was forbidden from leaving the Country following a decision taken by the Prosecutor General of the Anti-Corruption Court. He claimed that the impugned decision was unlawful and should be repealed.

The Applicant's case was that Mr.Rufyikiri was disbarred from the Roll of Advocates by the Court of Appeal, without following the right procedures and due process. And that when members of the Burundi Bar Association convened a meeting on 28th January 2014 in order to consider and analyse the said decision of the Court of Appeal of Bujumbura, Burundi security forces forcefully disrupted the meeting.

Applicant's complaint against the 1st Respondent is the allegations that the act of its servants/agents and institutions in prosecuting Mr. Isidore Rufyikiri before the Anti-Corruption Court, prohibiting him from travelling outside the Republic of Burundi and debarring him from the Roll of Advocates were unprocedural and in breach of Articles 6(d) and 7(2) of the Treaty.

**Held:**

1) The Applicant had a cause of action against the 1st Respondent and 2nd Respondents under Article 30 of the Treaty.
2) The Public Prosecutor acted within the limits of the power vested in him by the relevant Burundian Laws when he initiated the prosecution of Mr. Rufyikiri for alleged acts of corruption. Therefore, the 1st Respondent could not be faulted for violating Articles 6(d) and 7(2) of the Treaty.
3) There were procedural irregularities amounting to lack of procedural due process in the way Mr. Rufyikiri was banned from travelling outside the Burundian territory. Due process of law was not respected by the 1st Respondent and the procedure adopted to disbar Mr. Isidore Rufyikiri was in breach of the right to a fair trial and therefore a violation of the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty.
4) It is the duty of the 2nd Respondent to actively and proactively carry out his Treaty functions for the sake of bringing Partner States in compliance with Treaty obligations and ensure the advancement of East African integration. Although the 2nd Respondent had taken some actions in line with responsibilities under Article 71(1)(d), no effective action was taken to overcome the 1st Respondent's lack of cooperation was initiated as such an action would be effected under Article 29 of the Treaty.
5) A declaration was made that the procedure adopted and the decision taken by the Prosecutor General of the Anti-Corruption Court of Burundi to impose a travel ban on Mr. Isidore Rufyikiri contravened the rule of law principle embodied in Articles 6(d) and 7(2) of the Treaty.
6) The Court directed the Secretary General of the East African Community to immediately operationalize the Task Force set up on 15th January 2014 to investigate alleged violations of Treaty provisions by the Republic of Burundi.
7) The Republic of Burundi was also directed to take the measures required to implement this judgment without delay, including allowing the Secretary General's Task Force to carry out its investigative mission.

**Cases cited:**

Prof. Peter Anyang' Nyong'o and 10 Others v The Attorney General of Kenya and 3 Others, EACJ Ref. No. 1 of 2006

Samuel Mukira Mohochi v The Attorney General of the Republic of Uganda, EACJ Ref. 5 of 2011.

**Judgment**

**Introduction**

1. This is a Reference by the East African Law Society (hereinafter referred to as the "Applicant"), which is registered as a Company Limited by Guarantee in Tanzania, and as a Foreign Company Limited by Guarantee in Kenya, Rwanda and Uganda. Its address for service, for the purpose of this Reference is No.6, Corridor Area, Arusha, Post Office Box Number 6240 Arusha, in the United Republic of Tanzania.
2. The Reference was filed on 17th February 2014 under Articles 6(d),7(2),11,27,29,30,38,67(3)(d),71,143,146 and 147 of the Treaty for the Establishment of the East African Community and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (hereinafter referred to as the "Treaty" and the "Rules", respectively).
3. The Respondents are the Attorney General of the Republic of Burundi and the Secretary General of the East African Community who are sued on behalf of the Government of the Republic of Burundi and of the East African Community in their respective capacities as the Principal Legal Adviser of the Republic of Burundi and the Principal Executive Officer of the Community.

**4. Representation**

5. The Applicant was represented by Prof. Fredrick Ssempebwa, Mr. Francis Gimara and Mr. Humphrey Mtuy. Mr. Nestor Kayobera appeared for the 1st Respondent, while Mr.Wilbert Kaahwa and Mr. Stephen Agaba appeared for the 2nd Respondent.
6. Background
7. The Applicant is a dual membership organization comprising individual lawyers and 6 Law Societies namely, Burundi Bar Association; Rwanda Bar Association; Law Society of Kenya; Tanganyika Law Society; Uganda Law Society and Zanzibar Law Society. It has formal Observer Status with the East African Community.
8. At all material times, Mr. Isidore Rufyikiri was the President of the Burundi Bar Association and also the President of the Burundi Centre for Arbitration and Conciliation (CEBAC) and sometime in 2013, charges of corruption were made against him in respect of his association with CEBAC.
9. On 24th July 2013, Mr. Rufyikiri, wrote a letter Ref.: CAMRI/0427/2013 to the Governor of Bubanza Province in Burundi and the subject of the said letter read as "Litigation between Masenge Venant and the Government of Burundi: warning."
10. As a result of what was alleged by the 1st Respondent to be injurious and defamatory declarations contained in the abovementioned letter, the Prosecutor General of the Court of Appeal of Bujumbura, by his letter Ref.: No.552/11/1584/2013 of 07th October 2013, filed a complaint against Mr. Rufyikiri to the Bar Council of the

Burundi Bar Association and requested that the Council should take disciplinary measures against Mr. Rufyikiri.

11. On 29th October 2013, Mr. Rufyikiri, then also President of The Burundi Bar Association, organized a Press Conference in which he made declarations allegedly considered by the 1st Respondent to be against the rules, State security and public peace.
12. On 30th October 2013, the Prosecutor General of the Court of Appeal of Bujumbura, by his letter No.552/11/1722/2013 of 30th October 2013, requested the Bar Council of the Court of Appeal of Bujumbura to disbar Mr. Rufyikiri from the Roll of Advocates because of the abovementioned declarations made on 29th October 2013.
13. On 17th December 2013, the Prosecutor General made a complaint against Mr. Rufyikiri to the Court of Appeal of Bujumbura requesting his disbarment from the Roll of Advocates and the case was registered under RA10.
14. The Court of Appeal of Bujumbura, on 28th January 2014, by its decision in case RA10, disbarred Mr. Rufyikiri from the Roll of Advocates and ordered immediate execution of the judgment
15. On 03rd March 2014, Mr. Rufyikiri, through his Counsel, applied for review of the judgment of the Court of Appeal of Bujumbura by the Review Chamber of the Supreme Court of Burundi in Case No. RCC25.103. On 16th June 2014, the Review Chamber ruled against Mr. Rufyikiri and maintained the decision of the Court of Appeal of Bujumbura.
16. On 23rd December 2013, Mr. Rufyikiri sent an email to the Chief Executive Officer of the East African Law Society (EALS) in which he stated that he was forbidden from leaving the Country following a decision taken by the Prosecutor General of the Anti-Corruption Court. He then requested that EALS should sue, on his behalf, the Government of the Republic of Burundi before the East African Court of Justice seeking a declaration that the impugned decision is unlawful and therefore should be repealed.
17. The instant Reference was therefore filed by the East African Law Society, on 17th February 2014.

**The Applicant's Case**

18. The case for the Applicant was set out in the Reference, an affidavit in reply to the supplementary affidavit sworn on 05th November 2014 by Mr. Rufyikiri, the Reply to the 1st Respondent's Response to the Reference filed on 17th June 2014, the Applicant's written submissions filed on 07th November 2014, the Reply to the 2nd Respondent's Submissions filed on 15th December 2014 and the Applicant's Submissions in reply to the 1st Respondent's Submissions filed on 15th January 2015.
19. Briefly, the Applicant alleged that on 29th October 2013, Mr. Rufyikiri, in his capacity as the President of the Burundi Bar Association, addressed a press conference in which he raised issues concerning the rule of law, democracy and constitutionalism, and that as a result of the said press conference, the Prosecutor General of the Court of Appeal of Bujumbura made a complaint to the Burundi Bar Council requesting it to take disciplinary action against him.
20. He averred that the Bar Council had 60 days expiring on 30th December 2013, within

which it had to consider the complaint lodged by the Prosecutor General, but that, on 17th December 2013, the latter, without following the laid down procedures, introduced an action at the Court of Appeal of Bujumbura requesting that Mr. Rufyikiri be disbarred from the Roll of Advocates. He further alleged that on the same date of 17th December 2013, the Prosecutor of the Anti-Corruption Court made an order prohibiting Mr. Rufyikiri from travelling outside Burundi.

21. It was also the Applicant's case that the Court of Appeal, without following the right procedures and due process, disbarred Mr. Rufyikiri from the Roll of Advocates.
22. The Applicant asserted that when members of the Burundi Bar Association convened a meeting on 28th January 2014 in order to consider and analyse the said decision of the Court of Appeal of Bujumbura, Burundi security forces forcefully disrupted the meeting.
23. The Applicant then alleged that the acts of the servants/agents/institutions of the 1st Respondent of prosecuting Mr. Rufyikiri before the Anti-Corruption Court, disbarring him from the Roll of Advocates and prohibiting him from travelling outside Burundi were unprocedural, and in breach of the rule of law, good governance, the right of free movement, as well as Articles 6(d), 7(2), 11,27,29,30,38,67(3)(d),71,143,146 and 147 of the Treaty.
24. The Applicant further alleged that the 2nd Respondent was in breach of his duty under the Treaty for failure to regularly monitor the observance of Treaty obligations by Partner States so as to advise the Summit and the Council over measures to effect compliance.
25. The Applicant therefore seeks declarations and orders from the Court as follows:
    a) A declaration that the system of administration of justice and governance in Burundi is not conducive and enabling for the effective operation of the justice as envisaged by Articles 6(d) and 7(2) of the Treaty;
    b) A declaration that by virtue of the legal system currently existent in Burundi, there is no distinctive separation of powers between the Judiciary and the Executive and hence a breach of the relevant provisions in Articles 6(d) and 7(2) of the Treaty;
    c) A declaration that the procedure adopted and employed by both the Prosecutor General and the Court of Appeal of Bujumbura to disbar Mr. Isidore Rufyikiri was in breach of the international instruments on the right to a fair trial as provided by Articles 6(d) and 7(2) of the Treaty;
    d) A declaration that the decision and order of the Court of Appeal of Burundi [sic] of 28th January 2014; and the travel ban imposed on Mr. Isidore Rufyikiri by the Prosecutor General of the Anti-Corruption Court of the Republic of Burundi infringe upon and are in contravention of Articles 6(d), and 7(1)&(2) of the Treaty;
    e) An order removing into this Court for purposes of quashing and or setting aside the decision and orders of the Court of Appeal of Burundi made on the 28th January 2014 in case No.RA10 between the Public Prosecutor vs. Mr. Isidore Rufyikiri and an order directing the Court of Appeal of Burundi, the bar Council and the Government of Burundi to immediately and forthwith reinstate Mr. Isidore Rufyikiri to the table of Barristers of the Court of Appeal of Bujumbura [sic];

f) An order immediately and forthwith quashing, setting aside and or lifting the decision and orders of the Public Prosecutor to the Anti-Corruption Court of the Republic of Burundi prohibiting Mr. Isidore Rufyikiri from travelling beyond the national borders of Burundi;
g) An order directing the 2nd Respondent to constitute and commission an evaluation process to establish whether or not the governance and constitutional framework within the Republic of Burundi adheres to the threshold specified in Articles 6(d) and 7(2) of the Treaty and to advise both the Council and the Summit of the East African Community on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29,67,71,143,146 and 147 of the Treaty;
h) An order directing the 1st and the 2nd Respondents to appear and file before this Honorable Court a progress report on remedial mechanisms and steps taken towards the implementation of the Order sought by the Applicant in prayer vii above, every three months or such other lesser period as the Court shall deem expedient;
i) An order that the costs of and incidental of this Reference be met by the Respondents;
j) That this Honorable Court be pleased to make such further or other orders as may be necessary in the circumstances."

**First Respondent's Case**

26. The 1st Respondent's case is set out in his response to the Reference filed on 08th April 2014, an affidavit sworn on 04th April 2014 by Mr. Sylvestre Nyandwi, Permanent Secretary in the Ministry of Justice of the Republic of Burundi, a supplementary affidavit sworn on 10th October 2014 by the same Mr. Nyandwi and the 1st Respondent's written submissions filed on 16th December 2014.
27. In a nutshell, he denied the Applicant's allegations and counter-alleged:-
    a. That Mr. Rufyikiri as President of the Centre for Arbitration and Conciliation (CEBAC) mismanaged or caused mismanagement of funds belonging to the organization;
    b. As a result, the Prosecutor General of the Anti-Corruption Court decided to prosecute the said Mr. Rufyikiri for corruption and the case was still pending before the said Court;
    c. That because the said Mr. Rufyikiri wanted to flee the country, the Prosecutor General moved the Director General of Immigration to bar him from moving outside of Burundi;
    d. That the said Mr. Rufyikiri breached his oath as an advocate when he addressed a letter to the Governor of Bubanza Province, copied to high ranking officials of the East African Region and the International Community and organized a press conference and made statements that were injurious to state security and public peace;
    e. That subsequent to the aforesaid letter and press conference, the Prosecutor General of the Court of Appeal of Bujumbura moved the Court to disbar Mr. Rufyikiri, following the Bar Council's refusal to take disciplinary action against him;

f. That the Court of Appeal acted in accordance with the Laws of Burundi in disbarring Mr. Rufyikiri, and that the disbarment did not result into any injury or loss. In addition, the application for review of that decision was dismissed by The Supreme Court of Burundi; and
g. That nothing done by the servants/agents/institutions of the Government of Burundi contravened the Treaty.
h. The 1st Respondent, therefore, prays that the Court should dismiss the Reference with costs.

**Second Respondent's Case**

28. The 2nd Respondent's case is set out in his Response to the Reference filed on 07th April 2014, an affidavit sworn by Mr. Charles Njoroge, Deputy Secretary General, filed on the same date, as well as his written submissions filed on 28th November 2014. His case is as follows:-
    a) The 2nd Respondent has denied all responsibility in the matter before the Court as at all material times, and until 27th January 2014 when he received a letter from Mr. Rufyikiri, he was not aware of the matters complained of by the Applicant; and accordingly and contrary to the Applicant's pleadings, he cannot be blamed of any failure in the discharge of his duties and responsibilities;
    b) That as soon as he learnt of the matters complained of, and in accordance with the dictates of his office, he interceded with the Government of Burundi and established a Task Force to collect information on:-
        i) Alleged breaches of the Treaty by the Republic of Burundi; and
        ii) The cause of growing litigation on alleged breaches of the Treaty by the Republic of Burundi; and the effect, if any, of this development on the East African Community.
    c) The 2nd Respondent pleads that the granting of the Declaratory Order and other Reliefs sought by the Applicant against him does not arise and that the Reference should be dismissed with costs.

**Scheduling Conference**

29. Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on 18th September 2014, at which the following were framed as issues for determination by the Court:-
    1) Whether the Reference discloses a cause of action taking into account the provisions of Article 30(1) of the Treaty;
    2) Whether the acts of the servants/agents/institutions of the 1st Respondent in prosecuting Mr. Rufyikiri before an Anti-corruption Court, disbarring him from the Roll of Advocates and prohibiting him from travelling outside of Burundi constituted breach of the provisions of Articles 6(d) and 7(2) of the Treaty;
    3) Whether the 2nd Respondent failed/neglected his responsibilities under the provisions of Articles 29(1) and 71(1)(d) of the Treaty;
    4) Whether or not the Applicant is entitled to the remedies sought.

**Determination of the issues by the Court**

Issue No. 1: Whether the Reference discloses a cause of action taking into account the provisions of Article 30(1) of the Treaty

**Submissions**

30. While the Applicant argued that the Reference discloses a cause of action against the Respondents, the latter maintained that no cause of action did arise against them.

**Applicant's Submissions**

31. The Applicant's Counsel submitted that the Reference discloses a cause of action on different grounds:
32. Firstly, that Article 30(1) of the Treaty authorizes legal and natural persons, resident in a Partner State, to make a reference to this Court for determination whether a decision or action of a Partner State or the Community is an infringement of the Treaty. He argued that what that person needs to do is to plead facts that show there has been an action, decision, or omission by a Partner State or the Community and that the action, decision, or omission contravenes a provision of the Treaty.
33. In that regard, learned Counsel contended that the Applicant has pleaded in the Reference that the 1st Respondent, the Government of Burundi, a Partner State, unlawfully prosecuted Mr. Rufyikiri before an Anti-Corruption Court without regard to due process which is a component of the Rule of law; disbarred the same Mr. Rufyikiri from the Roll of Advocates without regard to the law or due process and without valid or lawful reason and without regard to due process, prohibited the same Mr. Rufyikiri from travelling outside of Burundi.
34. In line with the foregoing, Counsel for the Applicant submitted that the commitments by the Government of the Republic of Burundi are to *inter alia* adhere to the principles of good governance and rule of law under Article 6(d) and 7(2) of the Treaty.
35. As regards his case against the 2nd Respondent, Counsel submitted that the cause of action arose because he failed in his obligations under Articles 29(1) and 71(1)(d) of the Treaty to regularly monitor the observance of the Treaty obligations by the Government of Burundi so as to advise the Council of Ministers and the Summit of Heads of State over measures to effect compliance by the Republic of Burundi with its commitments under the Treaty.
36. Secondly, Counsel stressed that the cause of action in the instant Reference is not a breach of the human or other rights of Mr. Rufyikiri, but the alleged infringements of Treaty obligations. In support of this contention, Counsel relied to the decision of this Court in *Samuel Mukira Mohochi Vs The Attorney General of the Republic of Uganda, EACJ Ref. 5 of 2011*. He hastened to add that although Mr. Rufyikiri's rights are referred to in the Reference, the Court had decided that it would not abdicate from exercising its jurisdiction of interpretation under Article 27(1) of the Treaty merely because the Reference includes allegation of human rights violation. [See J*ames Katabazi and 21 others Vs The Secretary General of the East African Community and other, EACJ Ref. 1 of 2007 (The Katabazi Case) and The Attorney General of the Republic of Kenya Vs Independent Medical Unit, EACJ Appeal 1 of 2011 (The IMLU Case)*]

37. Counsel further argued that "The Partner States' obligations, to their citizens and residents, in respect of good governance, have 'through those States' voluntary entry into the EAC Treaty, been scripted, transformed, and fossilized into the several objectives, principles and obligations to be found in the Treaty the breach of which gives rise to a cause of action before this Honorable Court." [See *The IMLU Case (supra) and The Attorney General of Rwanda Vs Plaxeda Rugumba, EACJ Appeal 1 of 2012 (The Rugumba Case)*].
38. It was Counsel's final submission on this issue that "Whether some of the matters were litigated before the Burundi Courts is irrelevant to a cause of action. The Applicant and Respondents were not party to the Burundi litigation. The Burundi courts could not, and did not determine the issue of non-observance of the Treaty. Therefore *res sub judice* and *res judicata* are not applicable." [See *The Katabazi case (supra) and Anthony Calist Komu Vs The Attorney General of the United Republic of Tanzania, EACJ Ref. 7 of 2012*].

**1st Respondent's Submissions**

39. In reply to the Applicant's arguments supporting the existence of a cause of action against the 1st Respondent, the latter's Counsel asserted that this issue had to be addressed together with Issue No. 2 on the alleged breach of Articles 6(d) and 7(2) of the Treaty and relied on the decision of this Court in *Ndorimana Benoit Vs The Attorney General of the Republic of Burundi, EACJ Ref. No. 2 of 2014 (The Ndorimana case*) in support of his allegation.
40. Based on 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 the Treaty", learned Counsel submitted that there was no action which was unlawful or was an infringement of the Treaty and that, therefore, in the absence of such an action, no cause of action against the 1st Respondent could arise.
41. Counsel further pointed out that as elaborated in the 1st Respondent's Response to the Reference and in the Supplementary Affidavit of Mr. Sylvestre Nyandwi, Mr. Rufyikiri, in his capacity as the President of the Burundi Centre for Arbitration and Conciliation (CEBAC), was being prosecuted in the Anti-Corruption Court of Burundi in accordance with Law No.1/12 of 18th April 2006 on measures of preventing and combating corruption and related offences and Law No. 1/10 of 3rd April 2013 on Criminal Procedure Code of Burundi, under Case No.RMPCAC 2066.
42. He then contended that this case is distinguishable from The *Mukira Mohochi Case (supra)* since the whole process of prosecuting Mr. Rufyikiri and the measure prohibiting him from travelling outside Burundi did not violate any articles of the Treaty, including Articles 6(d) and 7(2) as they were being done in accordance with the relevant Laws of Burundi.
43. In the same vein, Counsel argued that since the disbarment of Mr. Rufyikiri was done in accordance with the applicable Burundian laws and by national competent institutions (i.e. Court of Appeal of Bujumbura and Review Chamber of the Supreme

Court of Burundi) as detailed in the Respondent's case above, there was no ground to support the Applicant's allegations that the 1st Respondent has violated his Treaty obligations embodied in Articles 6(d) and 7(2) of the Treaty. It is on the basis of the foregoing and again relying on the Ndorimana Case that he submitted that a cause of action against the 1st Respondent had not arisen.

**2nd Respondent's Submissions**

44. On his part, Counsel for the 2nd Respondent opted to address issues No.1 and No.3 jointly while stating that issue No. 2 did not relate to him.
45. Relying on the decision in P*rof. Peter Anyang' Nyong'o and 10 Others Vs The Attorney General of Kenya and 3 Others, EACJ Ref. No. 1 of 2006 (The Anyang' Nyong'o Case)* in which the nature of a statutory cause of action under Article 30(1) was expounded by this Court, he submitted however that no such cause of action as envisaged in the Reference arose against him.
46. He contended that the Applicant's claim against him is mostly based on suppositions that having been well aware of Mr. Rufyikiri's circumstances, he elected to do nothing about the matter, remained silent and failed to undertake, on his own initiative, investigations into the 1st Respondent's conduct in handling Mr. Rufyikiri's issue. Thus, Counsel argued that those suppositions on which the Applicant's claim was premised were not borne by any evidence in the Applicant's pleadings or at all and that the absence of evidence ought to be noted in the Applicant's disfavour.
47. As regards the 2nd Respondent's responsibilities under the Treaty, Counsel pointed out that the relevant provisions regulating this matter are Articles 29 and 71 of the Treaty and that Articles 143, 146 and 147 read together with Articles 67 and 71 of the Treaty referred to matters that were beyond the 2nd Respondent's competence.
48. Article 29(1) of the Treaty provides that "Where the Secretary General considers that a Partner State has failed to fulfil 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." Article 71(1)(d) of the Treaty provides that "1. The Secretary General shall be responsible for: .... (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."
49. Counsel deduced from the foregoing provisions that the 2nd Respondent's responsibilities are, firstly, to submit his findings to a Partner State that has failed to fulfil an obligation under the Treaty with a view of soliciting a response thereto; and secondly, to undertake investigations into matters relating or affecting the Community that appear to him, as head of the Secretariat, to merit examination. He then argued that "the two responsibilities cannot be exercised contemporaneously (at the same time), but that they can only be exercised consecutively (one after the other). The import of this is that investigations into a matter will first have to be carried out [Article 71(1)(d)] before the 2nd Respondent can make and submit his findings to the concerned Partner State to respond thereto[Article 29(1)]. Therefore, there cannot be a concurrent infringement of provisions that are supposed to be complied with sequentially. It is not tenable to argue, as the Applicant seeks to do,

that the 2nd Respondent 'infringed Article 29(1) and 71(1)(d) of the Treaty')."

50. Basing his reasoning on the sequential approach developed above, Counsel argued that an Applicant would be entitled to a finding that the 2nd Respondent infringed Articles 29(1) or 71(1)(d) of the Treaty if it were proved that the latter had not taken the initiative to investigate a matter relating to or affecting the Community that appears to it to merit examination or upon investigating such a matter, he had failed or refused to submit findings to the concerned Partner State to respond thereto.
51. It was Counsel's submission that judging from the Applicant's pleadings on record, there was nothing to prove that the 2nd Respondent had failed/neglected his responsibilities under Articles 29(1) or 71(1)(d) of the Treaty. On the contrary, he invited this Court to consider his positive stance and actions on the matters pertaining to Mr. Rufyikiri. In this regard, he pointed out, as deponed in Mr. Charles Njoroge's Affidavit that appropriate steps were taken by way of constituting a Task Force to investigate the alleged breach of Treaty provisions by the Republic of Burundi way before the Applicant had even filed the instant Reference. In addition, he averred that the 1st Respondent was informed about the Team and dates were proposed for a possible meeting to discuss, among other issues, the alleged breach of the Treaty, although despite several reminders, the 1st Respondent did not assent to any proposed schedule in order to start investigations.
52. Moreover, it was submitted that this Court's decision in the *Katabazi Case (supra)* cannot be cited to fault the 2nd Respondent because as indicated in his evidence, he, without being prompted but upon his own consideration that the matters allegedly affecting Mr. Rufyikiri merited examination within the meaning of Article 29 of the Treaty, took immediate action.
53. In concluding his submissions, Counsel for the 2nd Respondent contended that "the Reference does not disclose a cause of action against the 2nd Respondent because there is no evidence to show that Articles 29(1) and 71(1)(d) of the Treaty were infringed as alleged or at all. If anything, the 2nd Respondent has led evidence to show that he complied with Article 71(1)(d) of the Treaty. The obligation under Article 29(1) can only be triggered by the completion of the investigations provided under Article 71(1)(d) of the Treaty. This has not yet happened. Having established that the Reference does not disclose a cause of action against the 2nd Respondent, it cannot also be argued that he failed/neglected his responsibilities under the provisions of Articles 29(1) and 71(1)(d) of the Treaty."

**54. Determination of Issue No.1**

55. It can be gleaned from the Applicant's pleadings and submissions that the crux of the Applicant's complaint against the 1st Respondent is the allegations that the act of its servants/agents and institutions in prosecuting Mr. Isidore Rufyikiri before the Anti-Corruption Court, prohibiting him from travelling outside the Republic of Burundi and debarring him from the Roll of Advocates were unprocedural and in breach of the 1st Respondent's Treaty obligations, in particular Articles 6(d) and 7(2) of the Treaty.
56. In this regard, the Applicant's Counsel has submitted that the cause of action against the 1st Respondent is constituted by the aforesaid allegations of infringement of

specific Treaty provisions by the Government of Burundi. In support of this stance, learned Counsel has referred us to the authorities indicated above.

57. For the determination of the cause of action against the 1st Respondent, we are of the view that the findings of this Court in *Samuel Mukira Mohochi (supra)* referred to us by Counsel for the Applicant are conclusive. In the same line, we find that the Treaty provisions alleged to have been violated have, through Burundi's voluntary entry into the Treaty, been crystallized into actionable obligations, now stipulated in among others, Articles 6(d) and 7(2) of the Treaty, breach of any of which by the Republic of Burundi (1st Respondent) would give rise to infringement of the Treaty. It is that alleged infringement which, through interpretation of the Treaty under Articles Article 27(1) of the Treaty constitutes the cause of action in the instant Reference. Facts and applicable Burundian laws in support of the claim have been presented by the Applicant which led him to the allegation that acts committed by the Respondent infringe Articles 6(d) and 7(2) of the Treaty.
58. We are of the opinion that for the Applicant, it is enough to clearly state a complaint against the 1st Respondent that its actions, to wit, prosecuting Mr. Rufyikiri before the Anti Corruption Court and issuing a travel ban without due process of law and alleged irregularities in initiating a case against Mr. Rufyikiri to disbar him from the Bar Association without awaiting the decision of the Bar Council, all constitute a cause of action against the 1st Respondent.
59. In support of his submissions that the Reference does disclose a cause of action against the 1st Respondent, Counsel referred us to some authorities including *The James Katabazi Case (supra) and The Anyang' Nyong'o Case (supra)*.
60. We note that in the *Anyang' Nyong'o Case (supra, p. 18)*), this Court defined a cause of action as "a set of facts or circumstances that in law gives rise to a right to sue or to take out an action in court for redress or remedy." The Court further opined that the Treaty provides for a number of actions that may be brought to this Court for adjudication. In this regard, the Court was of the view that Article 30 of the Treaty, among others, virtually creates a special cause of action, which different parties may refer to this Court for adjudication.
61. It was also the Court's opinion that in Article 30 as reproduced elsewhere above, "the Treaty confers on any person resident in a Partner State the right to refer the specified matter to this Court for adjudication and as we have just said, by the same provision it creates a cause of action."
62. Regarding the claim in this Reference, we note that the Applicant is a legal person and as "the umbrella regional organization of the national bar associations within East Africa", it was prompted to bring this Reference following what it considered as the unprocedural manner in which Mr. Rufyikiri, then President of the Burundi Bar Association, was prosecuted before the Anti-Corruption Court, banned from leaving the country and disbarred from the Roll of Advocates of the Burundi Bar Association.
63. Given the foregoing, we hold that the Applicant has a cause of action against the 1st Respondent under Article 30 of the Treaty.
64. As for the 2nd Respondent, who is the Secretary General of the Community, the cause of action arises from the fact that the Applicant is faulting him for having allegedly

sat idly by, omitting or neglecting to act on violations of the Treaty by a Partner State through the alleged illegal treatment of Mr. Rufyikiri by agents/servants/officials of the Republic of Burundi.

65. On his part, Counsel for the 2nd Respondent categorically refuted the Applicant's argument contending that the 2nd Respondent had discharged his obligation as prescribed in the Treaty, and therefore, there is no cause of action against him.
66. Using the same reasoning as above, we are of the view that a cause of action against the 2nd Respondent has arisen by the fact that the Applicant, a legal person resident of a Partner State, is moving the Court alleging that the 2nd Respondent failed to take appropriate actions, under Articles 29 and 71 of the Treaty, against a Partner State alleged to have violates its Treaty obligations by the unprocedural way it handled Mr. Rufyikiri's case.

    On Issue No. 1, therefore, we hold that the instant Reference discloses a cause of action against both the 1st and 2nd Respondents.

    Issue No. 2: Whether the acts of the servants/agents of the 1st Respondent in prosecuting Mr. Isidore Rufyikiri before an Anti-Corruption Court, disbarring him from the Table of Barristers and prohibiting him from travelling outside Burundi constituted a breach of the provisions of Article 6(d) and 7(2) of the Treaty.

**Applicant's Submissions**

67. The Applicant contended that "the sum total of the treatment so meted out to Mr. Isidore Rufyikiri amounts to a scheme by the Government of Burundi to suppress criticism, and/or democratic advice, to interfere with the rule of law, and a wanton disregard of the human and professional rights of a Burundi citizen and therefore contrary to the principles of the Treaty as provided in Articles 6(d), and 7((2)."
68. As regards the prosecution of Mr. Rufyikiri and the prohibition from travelling outside the country, Counsel for the Applicant alleged that the scheme of acts that amounts to violation of the Treaty was disclosed by the 1st Respondent's failure to prove that there were any valid grounds for commencing a prosecution against Mr. Rufyikiri in the Anti-Corruption Court.
69. In addition, learned Counsel submitted that given that Mr. Sylvestre Nyandwi's affidavit in support of the 1st Respondent's Response alleged but did not disclose any evidence of mismanagement of CEBAC funds, the proper inference from that allegation was that no evidence of mismanagement existed. To buttress this contention, Counsel stated that an official audit conducted on the account of CEBAC did not raise any irregularities.
70. Furthermore, it is his stance that there was no nexus between Mr. Rufyikiri as President of CEBAC duly elected by the General Assembly of CEBAC and the Government of Burundi. That therefore, there was no reason for the Government's action when Mr. Rufyikiri was properly accounting to the Assembly of CEBAC, an independent body, which never complained over his alleged misconduct.
71. Counsel also contended that the 1st Respondent had alleged, but had not presented any evidence in proof, that Mr. Rufyikiri was about to flee Burundi so as to defeat justice. On that, he maintained that the prohibition to go out of Burundi was a penalty under Burundian law meted out by a Court and not the Prosecutor General who did

it in utter disregard of the rule of law.

72. On this matter, he concluded by submitting that since the contents of the Applicant's Reply had not been contradicted in any way, they represented the correct version of the events and were in proof of "the scheme against good governance, particularly, the rule of law."
77. Regarding the disbarment of Mr. Rufyikiri from the Roll of Advocates, the Applicant's Counsel submitted that it was because of a press conference held by Mr. Rufyikiri, on 29th October 2013, in his capacity as the President of the Burundi Bar Association and in which he raised issues of lack of good governance, democracy and abuse of human rights, that the Government reacted the following day of 30th October 2013 by commencing the disbarring process against Mr. Rufyikiri.
78. It was his submission that the Government of Burundi's actions could not have been triggered by Mr. Rufyikiri's letter to the Governor of Bubanza Province, dated 24th July 2013, two months before the action by the Government. His submission in that case was that the Government's reaction constituted "another step in the overall scheme" to punish Mr. Rufkiri. In support of this submission, he stated that the contents of that letter were clearly alleging violations of rights in Burundi generally, although singling out the particular case of Mr. Venant Masenge.
79. He further argued that since the letter was written in Mr. Rufyikiri's capacity as an advocate pursuing a client's interests, in that capacity, he was entitled to the protection accorded to legal professionals under the Burundian law and International Instruments.
80. Counsel also contended that when reference was made in the said letter to the historical cleavage between ethnic communities of Burundi, it was simply pointing out that all the people of Burundi were entitled to equal protection of their human rights and that peoples' (community) rights were protected by the African Charter on Human and People's Rights, which was in turn, entrenched by Article 6(d) of the Treaty.
81. Learned Counsel further stressed that the 1st Respondent had not presented any evidence that the Governor of Bubanza Province or the Government of Burundi have denied the allegations in Mr. Rufyikiri's letter and that the Government of Burundi's pursuit of that letter in the manner pleaded by the 1st Respondent "clearly demonstrates Burundi's inclination to suppress criticism and to disregard the rule of law that Mr. Isidore Rufyikiri was attempting to protect."
82. Addressing the matter related to the Burundi Courts' approval of the disbarment of Mr. Rufyikiri from the Roll of Advocates, the Applicant's Counsel submitted that Mr. Sylvestre Nyandwi's supplementary affidavit dated 9th October 2013, in which he indicated that the travel ban against Mr. Rufyikiri had been lifted and that the disbarment of the latter had been approved by the court of last resort in Bujumbura, had no consequence to the Applicant's pleadings and remedies sought.
83. He maintained that the Applicant had stated as a fact also confirmed by Mr. Sylvestre Nyandwi's affidavit dated 4th April 2013, that the Prosecutor General, on 17th December 2013, in total disregard of proper procedures, had made a complaint to the Court of Appeal of Bujumbura to disbar Mr. Rufyikiri. In addition, Counsel averred that before the Prosecutor General made the said complaint to the Court, he had

made a complaint against Mr. Rufyikiri to the Burundi Bar Association dated 30th October 2013.

84. Learned Counsel stated that, by law, the Burundi Bar Council had 60 days from the date of the complaint within which to take action. He then submitted that the 60 days began to run from 30th October 2013, the date of the complaint as indicated above. He further contended that there was no nexus between the complaint of 30th October 2013 to the Burundi Bar Council and that made on 7th October 2013. In this regard, he argued that the two complaints were referring to different alleged violations by Mr. Rufyikiri. For him, the complaint of 7th October 2013 was based on the alleged injurious contents of the letter to the Governor of Bubanza Province, while the complaint of 30th October 2013 was driven by the alleged offensive statements at the press conference. Moreover, he pointed out that the demand for disbarment was made in the letter of 30th October 2013 and not the letter of 7th October 2013.
85. It is therefore Counsel's submission that by approaching the Court on 17th December 2013 with a request to disbar Mr. Rufyikiri, the Prosecutor General had disregarded proper procedures and the law, particularly the requirement to allow the Bar Council of the Burundi Bar Association the time prescribed by law within which to act. He further submitted that the entire process leading to disbarment of Mr. Rufyikiri in such an unprocedural manner was part of what he termed "the total scheme against the principle of good governance, democracy, the rule of law and the respect for human and people's rights."
86. In support of his stance that "any wanton disregard of the rule of law as happened in this case should be condemned by this Honourable Court as in breach of the Treaty which is the basic law of the Community" and supersedes national law on the same issues, learned Counsel referred us to *Article 8(4) of the Treaty and the Authorities of R.V. Secretary of State for Transport, ex-part factortame Ltd. And Others [1990] ECR 1-2433; N.V. Algemene Transporta Expiditie Onderming Van gen En Loos V. Nederlandse Administratie Del Belastingen [1903] ECA 1 and Samuel Mukira Mohochi (supra)*.
87. Counsel concluded his submission on this matter by contending that accessing a remedy in Burundi was not a bar to the instant Reference and cited in support of his argument The *Anyang' Nyong'o Case (supra) and Antony Calist Komu Vs. The Attorney General of the United Republic of Tanzania, EACJ Ref. 7 of 2012*.
The submission of the 1st Respondent's Counsel on this issue has been reproduced above together with his submission on Issue No.1.

**Determination of Issue No. 2**

88. We have carefully considered the rival submissions made by the parties on this matter. As framed, the issue can be divided into three sub-issues referring to impugned acts allegedly committed by the 1st Respondents, namely, the prosecution of Mr. Rufyikiri before the Anti-Corruption Court, the travel ban imposed to the same Mr. Rufyikiri and his disbarment from the Roll of the Advocates. These acts will be reviewed in light of the relevant Burundian Laws referred to us by both parties. The said laws are Law No.1/12 of 18th April 2006 establishing measures on preventing and combating corruption and related offences; Law No. 1/10 of 03rd April 2013 on the Revised

Criminal Procedure Code; Law No. 1/014 of 29th November 2002 on the Reform of the Statute of the legal profession and Law No. 1/05 of 22nd April 2009 on the Revised Penal Code.

89. Regarding the prosecution and the prohibition from travelling, in paragraph 7 of Mr. Sylvestre Nyandwi's affidavit, it is deponed that "on 2/12/2013, the Public Prosecutor to the Anti-Corruption Court took measure to ban Mr. Isidore Rufykiri to leave the Country in order to get him whenever required in the prosecution of the penal case No. RMPCAC 2066 KI opened in the anti-corruption Court in accordance with Law No. 1/12 of 18th April 2006 on measures of preventing and combating corruption and related offences as well as Law No.1/10 of 3rd April 2013 on Penal procedure Code of Burundi."
90. In order to determine whether the two aforementioned acts were done in accordance with the Burundian laws, we found that Articles 1, 3, 5, 6 and 10 of the *Anti-Corruption Law No.1/12 (supra)*; Articles 47, 50 and 65 of the Criminal Procedure Code and Articles 60 and 65 of the Penal Code are relevant in addressing the matter at hand. For clarity's sake, we are respectively reproducing these provisions below.

Law No. 1/12 of 18th April 2006 (Anti-Corruption Law)

Article 1:

This Law aims at preventing and combating corruption and related offences committed by public and private institutions as well as non-governmental organizations.

Article 3: For the implementation of the national policy on fighting corruption and related offences, it is set up an institutional framework composed of:

- A Special Anti Corruption Brigade
- An Anti Corruption Court.

Article 5: The missions of the Special Anti Corruption Brigade are as follows:

- handle grievances or complaints of suspected corruption or related offences
- submit to the Public Prosecutor, after the conclusion of its investigation, facts that may constitute offences of corruption or related offences

(..)

Article 6: Under the provisions of the Criminal Procedure Code and without prejudice to the powers vested in the judicial police officers, officers of the Anti Corruption Brigade have the powers granted to judicial police officers.

As such, they are competent to investigate offences of corruption and related offences, collect evidence, to find the perpetrators and, if necessary, proceed to police custody pursuant to the Criminal Procedure Code.

Article 10: The head of the Special Anti Corruption Brigade may request to the competent authority the prohibition of leaving the territory for any suspect.

Law No.1/10 of 3rd April 2013 on Criminal Procedure Code

Article 47: The Public prosecutor exercises the public action and requires the application of the law. It directs and controls the activities of the judicial police and all public officials having the quality of judicial police officer

Article 50: The Public Prosecutors may exercise themselves all powers attributed to judicial police officers under this law or under special laws related to Judicial Police

Article 65: The Public Prosecutor conducts or causes to conduct any act necessary to the investigation and prosecution of offences to the penal code.

To that end, he directs and controls the activity of judicial police officers and agents in the Tribunal jurisdiction.
Law No.1/05 of 22nd April 2009 on Penal Code
Article 60: Complementary punishment applicable to physical people are:
(…)
2. Prohibition
Article 65:
In cases determined by law, following prohibitions can be pronounced:
(….)
6. Prohibition of going outside the country.

91. Having laid down the above provisions applicable to this matter, we now turn to the first bone of contention, that is, the alleged unprocedural manner in which Mr. Rufyikiri was prosecuted before the Anti Corruption Court.
92. From the outset, it is our understanding that our task as regards this matter is not to determine whether or not acts of corruption were committed by Mr. Rufyikiri as the President of the Burundi Centre for Arbitration and Conciliation, but that it is rather to assess whether the act of initiating his prosecution by the Prosecutor General was in conformity with the relevant laws of Burundi. The same test will be carried out later in this judgment when it comes to determine whether the travel ban was issued in accordance with Burundian Laws.
93. In this regard, we find that the pre-cited Law No.1/12 whose aim is to prevent and combat corruption and related offences applies to both public and private institutions (Article 1) and it also creates the Anti-Corruption Court and the Special Anti-Corruption Brigade as the institutional entities competent to handle offences of corruption and related offences (Article. 3). In addition, Articles 5 and 6 of Law No.1/12 and Articles 50 and 65 of Law No.1/10 clearly spell out the power invested in the Public Prosecutor to initiate the criminal prosecution of any person, being public or private, suspected of committing an act of corruption.
94. Based on the foregoing findings, we are of the view that a plain reading of the abovementioned provisions leads to the conclusion that the Public Prosecutor acted within the limits of the power vested in him by the relevant Burundian Laws when he initiated the prosecution of Mr. Rufyikiri for alleged acts of corruption. Consequently, we hold that the 1st Respondent cannot be faulted for violating Articles 6(d) and 7(2) of the Treaty.
95. Turning to the act of banning Mr. Rufyikiri from travelling outside the Burundian territory, the bone of contention appears to revolve around the authority competent to order a travel ban against a suspect. Counsel for the Applicant argued that such a ban should be issued by a court of law while Counsel for the 1st Respondent contended that the competent authority in that matter is the Public Prosecutor.
96. As it transpired from the material placed before the Court and in submissions during the hearing held on 11th February 2015, both parties relied on Article 10 of Law No/1/12 as reproduced above in support of their respective arguments on this issue. When asked by the Court which authority is referred to in this article, Counsel for the 1st Respondent replied that the Prosecutor General is the one competent to issue a travel ban and that no intervention of a court of law is required.

97. This averment was rebutted by Counsel for the Applicant by quoting the provisions of Articles 60 and 65, paragraph 6 of the Penal Code according to which such a competence is the prerogative of a Court of law.
98. We agree with Counsel for the Applicant's reading of the two provisions that according to Burundi Laws, the prohibition from travelling outside the territory of Burundi is imposed by an order of the court. Accordingly, it is our view that procedural irregularities amounting to lack of procedural due process were committed in the way Mr. Rufyikiri was banned from travelling outside the Burundian territory. Consequently, we hold that due process of law, one of the cornerstones of the rule of law, was not respected by the 1st Respondent and that this constitutes a violation of its Treaty obligations under Articles 6(d) and 7(2) of the Treaty.

Disbarment from the Roll of Advocates of the Burundi Bar Association

99. As the case stands, the bone of contention appears for us to be whether due process of law was followed in filing a disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura while the time required for the Bar Council to decide on the complaint filed by the Prosecutor General to consider disbarring the same Mr. Rufyikiri had not elapsed.

**Applicable Law**

100. The applicable law as referred to us by the parties is Law No. 1/014 of 29th November 2002 on the Reform of the Statute of the legal profession (Advocates Act, 2002) and the relevant provisions applicable to the instant matter are Articles 57, 61, 63, 65, 67 and 71 of the said law. For ease of reference, we are reproducing them hereunder.

Article 57 provides that:

"Any violation of laws and regulations, any breach of professional rules , any breach of probity and honor even relating to extra-professional facts , expose the lawyer (or trainee lawyer ) who is the author to the following disciplinary sanctions:

- Warning;
- Blame;
- Suspension for a period of one year at most;
- Disbarment from the Roll of Advocates.

The blame and the suspension may be associated with the ban to be part of the Bar Council for a period not exceeding ten years.

Article 61 provides that:

"The Bar Council is competent to take all disciplinary sanctions against lawyers. The Court of Appeal has jurisdiction to hear appeals against the sanctions imposed by the Bar Council.

The Bar Council shall act on its own motion or at the request of the Prosecutor General to the Court of Appeal.

The Bar Council and the Court of Appeal shall take decide in a reasoned decision after a contradictory hearing."

Article 63 reads as follows:

"Any decision of the Bar Council in disciplinary matters may be referred to the Court of Appeal by the applicant's counsel or the Prosecutor General at the said Court."

Article 65 stipulates that:

"The investigation is conducted by the Bar Council.

After investigation, the Bar Council closes the case if it considers the complaint unfounded or declares the penalty it considers proportionate to the offence committed by the lawyer."

Article 67 provides that:

"The disciplinary matter is referred to the Court of Appeal by the Prosecutor General to the Court of Appeal.

The Council may take the matter without any request from outside.

Article 71 provides that:

The Bar Council must take a decision within sixty (60) days from the day a disciplinary matter was referred to it."

101. From the chronology of events that led to the case before the Court of Appeal of Bujumbura filed on 17th December 2013 by the Prosecutor General, it is clear that two complaints had been filed to the Bar Council by the same Prosecutor General in accordance with Article 67 of the Advocates Act, 2002. The first complaint was filed on 7th October 2013 requesting the Bar Council to take disciplinary measures against Mr. Rufyikiri for alleged injurious and defamatory declarations contained in his letter of 24th July 2013 to the Governor of the Bubanza Province. The second complaint was filed by the same Prosecutor General on 30th October 2013 requesting the disbarment of Mr. Rufyikiri for making declarations alleged to be against the rules, State security and public peace, during the 29th October 2013 Press Conference held by Mr. Rufyikiri.

102. If we consider the provisions of Article 71 of the Advocates Act 2002, we note that the Bar Council had up to 7th December 2013 to take a decision on the complaint filed on 7th October 2013 and up to 30th December 2013 as regards the complaint for disbarment submitted to it.

103. From this simple computation of time, it is apparent that the filing of the disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura by the Prosecutor General, on 17th December 2013, falls 13 days short of the 60 days allowed to the Bar Council by Article 71 of the Advocates Act for the Council to take a decision on the matter. In doing so, the Bar Council was bypassed and thus, the right of Mr. Rufyikiri to have his case heard by the very professional body in charge of disciplining advocates was violated.

104. In light of the foregoing findings, we hold that not following the letter of law (i.e. exhausting the period of time allowed to the Bar Council to take a decision on the disciplinary matter) in instituting the disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura, constituted a violation of due process and this contradicts the Respondent's Counsel's contention that Mr. Rufyikiri was disbarred in accordance with the law. Having so found, we see no reason to scrutinize the Court of Appeal process. On the disbarment issue therefore, we hold that the violation of due process by the 1st Respondent offends the rule of law principles enshrined in Articles 6(d) and 7(2) of the Treaty.

Issue No. 3: Whether the 2nd Respondent failed/neglected his responsibilities under the provisions of Articles 29(1) and 71(1)(d) of the Treaty

**Submissions**

105. Counsel for the Applicant submitted that the gist of the Applicant's case against the 2nd Respondent was that, having got prior knowledge of the alleged violations of the 1st Respondent's Treaty obligations triggered by the unprocedural way in which Mr. Rufyikiri's case was handled, the 2nd Respondent did not take any action that would have compelled the 1st Respondent to comply with its Treaty's commitments.

106. In order to prove that the 2nd Respondent had prior knowledge about allegations of lack of good governance in Burundi, learned Counsel referred to letter Ref.: CAMRI/0484/2013 of 27th December 2013 written by Mr. Rufyikiri to the Public Prosecutor of Burundi and copied to the EAC Secretary General, among others. In addition, he pointed out the contents of letter Ref. ORG/2/1 of 11th November 2013 written by the EAC Secretary General to the Minister to the Office of the President Responsible for EAC Affairs in Burundi, in which the Secretary General brought to the attention of the 1st Respondent some matters of alleged violations of its Treaty obligations, including allegations that were mentioned in the letter above from Mr. Rufyikiri.

107. It was also Counsel's submission that rather than waiting to be prompted to act by litigants, the 2nd Respondent ought to have acted on his own and should have exercised pro-activeness in as far as bringing Partner States to account regarding their actions especially those actions that seemingly violate the Treaty's provisions.

108. In response to the Applicant's contentions referred to above, the 2nd Respondent categorically denied any wrongdoing. He rather brought out several actions undertaken as highlighted in his case above, but pointed out that these actions did not bear any positive results, because they have been frustrated by the 1st Respondent's lack of cooperation as regards the operationalization of the Task Force set up to investigate the alleged breach of the Treaty provisions by the Republic of Burundi even before the instant reference was filed on 17th February 2014.

**Determination of Issue No. 3**

We have carefully reviewed the parties' pleadings and submissions on this matter and we opine as follows:

109. It is on record that by his letter Ref. ORG/2/1 of 11th November 2013 mentioned above, the 2nd Respondent brought to the attention of the 1st Respondent, through the Minister to the Office of the President Responsible for EAC Affairs, two claims about land and property matters while stressing that those claims, if not handled properly, could give rise to failure of due process. In the same letter, the 2nd Respondent expressed his concern at the proliferation of litigation from the Republic of Burundi mainly relating to allegations of failure of due regard to Article 6 of the Treaty and informed the 1st Respondent of an upcoming mission in the Republic of Burundi to interact with the Ministry of Justice and other relevant Government Departments on these issues.

110. Also on record is the Secretary General's Internal Memo Ref.: RG/2/1 of 15th January 2013 entitled: Situation on the Administration of Law and Justice in the Republic of Burundi. In the said Memo, the Secretary General stated that pursuant to the powers entrusted to the Secretariat under Article 71(1)(d) of the Treaty, he was

appointing some staff members into a Task Force to investigate:

"a) alleged breaches of the Treaty by the Republic of Burundi;

b) the cause of growing litigation on alleged breaches of the Treaty emanating from the Republic of Burundi; and

c) the effect, if any, of this development on the Community."

111. The Task Force was required to undertake a Mission in the Republic of Burundi and prepare a report by 1st March 2014. We note, however, that it was on the same date that the appointment of the said Task Force was communicated to the 1st Respondent, through the Secretary General's letter to the Permanent Secretary of the Ministry to the President Responsible for EAC Affairs. In the said letter, it was indicated that the Task Force had planned to visit the Republic of Burundi on 19th-23rd March 2014.

112. We further note that, on 11th March 2014, the 1st Respondent, through the Minister to the Office of the President Responsible of EAC Affairs, informed the Secretary General that the proposed dates for the visit were not convenient for the Republic of Burundi and that the Republic of Burundi would communicate new dates after further internal consultations.

113. Since then, no further communication on this matter has been made by either side and the 1st Respondent who is the Republic of Burundi is yet to allow this Task Force to go there and undertake investigations.

114. During the hearing of the instant case held on 11th February 2015, in response to the question put to him as why the 2nd Respondent had not undertaken actions prescribed in Article 29 of the Treaty in the event that a Partner State is not being cooperative to allow him carrying out investigations on alleged violations of Treaty provisions, we heard learned Counsel to be intimating that the Secretary General had undertaken a diplomatic visit to the Republic of Burundi in which the issue of the stalled work of the Task Force was raised. He then conceded, however, that now that the matter was before this Court, any order that the Court might take would be further support for the 2nd Respondent to execute investigations to ensure that the Republic of Burundi is brought to compliance with the Treaty obligations.

115. 114.. In the matter at hand, we must note at this juncture that although some actions have been undertaken in line with the 2nd Respondent's responsibilities under Article 71(1)(d) of the Treaty, no effective action to overcome the 1st Respondent's lack of cooperation was initiated as such an action would be effected under Article 29 of the Treaty.

116. In this regard, we are of the view that it is the duty of the 2nd Respondent to actively and proactively carry out his Treaty functions for the sake of bringing Partner States in compliance with Treaty obligations they voluntarily subscribed to in order to ensure the advancement of East African integration. We shall make an order in this regard later in the judgment.

Issue No. 4: Whether or not the Applicant is entitled to the remedies sought

117. We have addressed all the core issues as framed during the Scheduling Conference and we now proceed to determine the prayers sought in the Reference in light of our findings.

118. Starting with the submissions of Counsel for the 1st Respondent, the latter relied

on the *Ndorimana case (supra)* and submitted that the Applicant is not entitled to any remedy sought and that the Reference ought to be dismissed with costs to the 1st Respondent.

119. The 2nd Respondent's Counsel, on his part, pointed out that out of the ten declarations and orders the Applicant had sought against the Respondents, it was only two of them that specifically related to the 2nd Respondent, namely the proposed orders under paragraphs (vii) and (viii).

120. As regards the order sought under paragraph (vii), learned Counsel contended that such an order cannot be issued because there was already a Task Force duly constituted and mandated to ascertain whether or not the 1st Respondent breached the fundamental and operational principles of the Community.

121. Concerning the order sought under paragraph (viii), the 2nd Respondent's Counsel submitted that Article 29 of the Treaty which covers the matter at issue did not confer upon the 2nd Respondent any advisory role to merit the grant of the order sought by the Applicant. He maintained that the order sought is not tenable and that the practical thing to do was to let the ongoing investigation that led up to the procedure laid out in Article 29 of the Treaty play out.

122. In his reply to the 2nd Respondent's submission, Counsel for the Applicant submitted that what was sought was for the 2nd Respondent to establish an effective Commission/investigative mechanism.

123. Our findings in the above regard are therefore as follows:

Prayer (a): A declaration that the system of administration of justice and governance in Burundi is not conducive and enabling for the effective operation of justice as envisaged by Articles 6(d) and 7(2) of the Treaty. The evidence on record pertained to specific acts of Treaty violation but it is not sufficient to warrant the declaration sought.

Prayer (b): A declaration that by virtue of the legal system currently existent in Burundi, there is no distinctive separation of powers between the Judiciary and the Executive and hence a breach of the relevant provisions in Articles 6(d) and 7(2) of the Treaty. This prayer too cannot be granted for the same reasons as in prayer (a).

Prayer (c): A declaration that the procedure adopted and employed by both the Prosecutor and the Court of Appeal of Bujumbura to disbar Mr. Isidore Rufyikiri was in breach of the international instruments on the right to a fair trial as provided by Articles 6(d) and 7(2) of the Treaty. This prayer is in part premised on Issue No.

2. Regarding the procedure leading to the disbarment of Mr. Rufyikiri, this Court finds that not following the prescribed legal process in instituting the disbarment case against Mr. Rufyikiri before the Court of Appeal of Bujumbura constitutes a violation of due process and this violation, imputable to the 1st Respondent, offends the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty.

Prayer (d): A declaration that the decision and order of the Court of Appeal of Bujumbura of 28th January 2014, and the travel ban imposed on Mr. Isidore Rufyikiri by the Prosecutor of the Anti-Corruption Court of the Republic of Burundi infringe upon and are in contravention of Articles 6(d) and 7(1) & (2) of the Treaty. The prayer is allowed in the following terms only: The unprocedural way in which Mr. Rufyikiri was banned from travelling outside the territory of Burundi is in contravention of the

rule of law principle embodied in Articles 6(d) and 7(2) of the Treaty.

Prayer (e): An order removing into this Court for purposes of quashing and or setting aside the decision and orders of the Court of Appeal of Bujumbura made on 28th January 2014 in case No. RA10 between the Public Prosecutor and Mr. Isidore Rufyikiri and an order directing the Court of Appeal of Bujumbura, the Bar Council and the Government of Burundi to immediately and forthwith reinstate Mr. Isidore Rufyikiri to the Roll of Advocates of the Court of Appeal of Bujumbura. The prayer is not allowed because it falls outside the Court's jurisdiction owing to the proviso to Article 27(1) of the Treaty.

Prayer (f): An order immediately and forthwith quashing, setting aside and or lifting the decision and orders of the Public Prosecutor to the Anti-Corruption Court of the Republic of Burundi prohibiting Mr. Isidore Rufyikiri from travelling beyond the national borders of Burundi. The prayer is overtaken by events since the travel ban has been lifted.

Prayer (h): An order directing the 2nd Respondent to constitute and commission an evaluation process to establish whether or not the governance and constitutional framework within the Republic of Burundi adheres to the threshold specified in Articles 6(d) and 7(2) of the Treaty; and to advise both the Council and the Summit of the East African Community on whether the Republic of Burundi should be suspended or expelled from the East African Community under Articles 29,67,71,143,146 and 147 of the Treaty. This prayer is based on Issue No. 3. In determining this issue, the Court finds that although some actions had been undertaken in line with the 2nd Respondent's responsibilities under Article 71(1)(d) of the Treaty, no effective action to overcome the 1st Respondent's lack of cooperation was initiated as such an action would be effected under Article 29 of the Treaty. The 2nd Respondent should actively and proactively fulfil his Treaty functions in order to ensure Partner States' compliance with their Treaty obligations. An order in this regard will be made at the end of this judgment.

Prayer (i): An order directing the 1st and the 2nd Respondents to appear and file before this Honourable Court a progress report on remedial mechanisms and steps taken towards the implementation of the Order sought by the Applicant in prayer (7) above, every three months or such other lesser period as the Court shall deem expedient. An order in this regard will be made at the end of this judgment.

Prayer (j): An order that the costs of and incidental to this Reference be met by the Respondents. The matter in issue falling in the category of public interest litigation, we deem it just that each party bears its costs.

**Final Orders**

124. For the reasons above, the final orders to be made are as follows:

I. Prayers (a), (b), (e) and (f) are disallowed and are consequently dismissed.

II. Prayers (c) is allowed in the following terms only: A declaration is hereby made that the procedure adopted and employed by the Prosecutor General to disbar Mr. Isidore Rufyikiri was in breach of the right to a fair trial and therefore a violation of the rule of law principle enshrined in Articles 6(d) and 7(2) of the Treaty.

III. Prayers (d) is allowed in the following terms only: A declaration is hereby made that the procedure adopted and the decision taken by the Prosecutor General of the Anti-Corruption Court of Burundi to impose a travel ban on Mr. Isidore Rufyikiri infringed upon and was in contravention of the rule of law principle embodied in Articles 6(d) and 7(2) of the Treaty.

IV. Prayers (g) and (h) are granted in the following terms:

(a) An order is hereby issued directing the Secretary General of the East African Community to immediately operationalize the Task Force set up on 15th January 2014 to investigate alleged violations of Treaty provisions by the Republic of Burundi.

(b) The Republic of Burundi is directed to take, without delay, the measures required to implement this judgment, including allowing the Secretary General's Task Force to carry out its investigative mission.

V. 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.4 of 2014

**Georges Ruhara And The Attorney General of the Republic of Burundi**

Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; & Fakihi A. Jundu, J
August 7, 2015

*Damages for illegal occupation of premises – Destruction of property- Limitation of time- Whether the acts complained of contravened the Treaty.*

*Articles 3(3)(b), 6(d), 7(2), 8(4), 27(1), 30(1) (2) of the EAC Treaty - Rules 24, 30(2), 48 and 49 of the EACJ Rules of Procedure, 2013- Article 373 of the Civil Procedure Act 01/010 of 13/5/2004, Burundi*

The Applicant, a resident of Burundi claimed to be the owner of a house and its outbuildings situated at Musaga, in the Mayorship of Bujumbura, Burundi. He contends that military troops have been occupying the house for 128 months from July, 2003 to March, 2014 without paying rent, concluding a rental paying agreement or restoring and returning the said house to him. On 23rd October, 2013, the Applicant wrote to the Minister for Defence requesting for the return of the house but he has received no response. He averred that furniture, equipment and other movables were destroyed and claimed *inter-alia* rent of BIF 384,000,000 for 128 months at the rate of BIF 3,000,000 per month and BIF 317, 7,000,000 for destruction of property and an infringement of Articles 6(d) and 7(2) of the Treaty.

The Respondent submitted that the occupation of the Applicant's house by the military troops was done for security reasons due to civil war and ethnic hatred in the Republic of Burundi and the presence of rebel movements in the Musaga, where the Applicant's house is located.

**Held:**

1) The Court had no jurisdiction to declare that the Applicant had a full right to enjoy his house and outbuildings or to order the Respondent to return the property to the Applicant. Further, the Court could not order the payment of the damages claimed as all these prayers fell outside Articles 23, 27 and 30 of the Treaty.
2) The occupation of the house and outbuildings by the military troops commenced in July, 2003 while the Reference was filed on 24th March, 2014, 11 years after the said occupation. Thus the Reference did not comply with the with the strict provisions of Article 30(2) of the Treaty and was struck out as time- barred.

**Cases cited:**

Hilaire Ndayizamba v. The Attorney General of Burundi and the Secretary General of the East African Community, EACJ Ref. No.3 of 2012
Hon. Sitenda Sebalu v. Secretary General of the EAC & 3 Others EACJ Ref. No.1 of 2010

Samuel Mukira Mohochi v. AG of Uganda, EACJ Ref. No.5 of 2011
Professor Nyamoya Francois v. the Attorney General of Burundi and the Secretary General of the East African Community, EACJ Ref. No. 8 of 2011

**Judgment**

**Introduction**

1. This Reference was lodged in this Court on 24th March, 2014. However, before it could be heard, the Applicant filed an Amended Reference ("The Reference") on 17th July, 2014.
2. The Reference has been filed under Articles 3(3)(b), 6(d), 7(2), 8(4), 27(1), 30(1) and (2) of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 24, 30(2), 48 and 49 of this Court 's Rules of Procedure ("the Rules").
3. The Applicant is a natural person and resident of Bujumbura in the Republic of Burundi, a Partner State of the East African Community. His address for service for the purpose of this Reference is care of Mr. Horace Ncutiyumuheto, a member of the Burundi Bar Association and an Advocate before the Courts and Tribunals in the Republic of Burundi. His Address is Avenue Boulevard, Patrice Lumumba Immeuble "Kwa Ngoma", and P.O. Box 1374, Bujumbura, Burundi.
4. The Respondent is the Attorney General of the Republic of Burundi and he is sued in his capacity as the Principal Legal Advisor of the Government of the Republic of Burundi. His address for service for the purpose of this Reference is care of the Ministry of Justice, the Republic of Burundi, P.O. Box 1870, Bujumbura, Burundi.
5. Initially, the Secretary General of the East African Community was joined as the 2nd Respondent by the Applicant. However, he later on withdrew or discontinued the Reference against the said Respondent as reflected in the proceedings of this Court dated 14th November, 2014.

**Representation**

6. Mr. Horace Ncutiyumuheto, Learned Counsel represented the Applicant. On the other hand, Mr. Nestor Kayobera, Learned Director of Judicial Organization in the Ministry of Justice, Burundi represented the Respondent.

**The Applicant's Case**

7. In his statement of Reference and supporting Affidavit, the Applicant claims to be the owner of a house and its outbuildings situated at Musaga, in the Mayorship of Bujumbura, Burundi. He contends that since July, 2003, the said house and outbuildings have been forcefully occupied by the military troops of the Government of Burundi without paying rent, concluding a rental paying agreement or restoring and returning the said house to him. The house was formerly fully equipped but during the period of occupation by the said military troops it has been destroyed tremendously including the living room furniture, equipment and other movables.
8. The Applicant further contends that the military troops have been in occupation of the house for 128 months from July, 2003 to March, 2014 when he instituted this Reference and are still in occupation of the same. The Applicant therefore claims

for:-

i) BIF 384,000,000 being total rent payments for 128 months at the rate of BIF 3,000,000 per month;
ii) BIF 317,7,000,000 being the total evaluated costs for the destroyed furniture, housing equipment and other movables;
iii) BIF 100,000,000 being damages for psychological frustrations and social discredit; and
iv) BIF 129,581,069 for restoration of the house, the asphalt and the car park.

9. The Applicant further contends that on 23rd October, 2013, he wrote a letter to the Minister for Defence requesting for the return of the house. The said letter was received on 29th October, 2013 but no response was made to the Applicant and under Article 373 of the Burundi Civil Procedure Act No.1/010 of 13/5/2004 keeping silent for more than three months by the Administrative Authority is "equivalent to a decision of setting aside of a graceful or hierarchical recourse."
10. Based on the aforesaid, the Applicant prays for the following declarations and orders from this Court:-
    a) A declaration that the occupation by force by the Respondent of the house and outbuildings of Georges Ruhara as mentioned above is an infringement of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
    b) A declaration that the Applicant has a full right to enjoy immediately the property of his house and outbuildings;
    c) An order that the Respondent returns to the Applicant his house and outbuildings;
    d) An order that Georges Ruhara be immediately paid the total amount of BIF 930,581,069.00 by the Respondent, without prejudice to all ulterior rental owed from March, 2014 up to full settlement; (sic)
    e) Direct that the Respondent shall pay all costs of this Reference.

**The Respondent'S Case**

11. In his Reply and supporting Affidavit, the Respondent contends that the occupation of the Applicant's house and its outbuildings by the military troops was done for security reasons. That there was civil war and ethnic hatred in the Republic of Burundi since independence and especially after the year, 1993 following the assassination of the first democratically elected President. Many rebel movements arose, some of which bombarded Bujumbura from the mountains surrounding it including Musaga, the area where the house of the Applicant is located and the Government military Forces had to deal with the said rebel movements from the said area.
12. The Respondent further contends that the Applicant wrote to the Minister of Defence and former Combatants demanding to be paid huge sums of rental amounts for a period of 128 months without there being a rental agreement. In response, the said Minister on 12th February, 2013 wrote to the Applicant explaining that the occupation of the house and its outbuildings by the military troops was for security reasons and that the issue ought to be dealt with in terms of the Arusha Peace and Reconciliation Agreement and the matter should have been referred to the Administrative Court of Burundi or to the Burundi National Commission on Lands and Other Properties. In case the Applicant became aggrieved by the decisions, of these entities, he could still

refer the matter to the Special Court on Land and Other Assets.

13. The Respondent contends further that the Reference is time-barred because the Applicant had filed the same eleven (11) years after the occupation of the house by the military troops. This is contrary to Article 30(2) of the Treaty and the Respondent also contends that this Court has no jurisdiction to entertain the Reference in terms of Articles 27(2) and 30(3) of the Treaty.
14. Based on the aforesaid, the Respondent prays for dismissal of the Reference with costs.

**Scheduling Conference**

15. Pursuant to Rule 53 of the Rules, a Scheduling Conference was held on 14th day of November, 2014 whereby all the Parties were present, and agreed that:-
"There are triable issues based on the provisions of Articles 6(d), 7(2), 27(2), 30(2) and 30(3) of the Treaty"
16. On the other hand, the following points were framed as points of disagreements or issues for determination by this Court:-
    5. Whether or not this Court has jurisdiction to entertain and determine the Reference;
    6. Whether the Reference is time barred;
    7. Whether the acts complained of by the Applicant contravene Articles 6(d) and 7(2) of the Treaty ; and
    8. Whether the Applicant is entitled to remedies sought.

    Consideration of Issue No.1: Whether or not this Court has jurisdiction to entertain and determine the Reference
17. The Applicant and the Respondent have each submitted on the aforesaid issue as reflected below.

**The Applicant's Submission**

18. The Applicant contends that this Court has jurisdiction to entertain and determine this Reference.
19. Citing Article 27(1) of the Treaty on the jurisdiction of this Court to interprete and apply provisions of the Treaty as well as Article 30(1) which authorizes legal and natural persons resident in a Partner State to make a reference to the Court for determination whether any Act, resolution, directive, decision or action of a Partner State or an institution of the Community is unlawful or an infringement of the Treaty, the Applicant contends that the Court is clothed with jurisdiction to entertain and determine this Reference.
20. In light of the said cited provisions, the Applicant further contends that he is only required to plead facts that show that Burundi, as a Partner State has undertaken an action or taken a decision which is unlawful and constitutes an infringement of the provisions of the Treaty. To this end, the Applicant contends that the Government of Burundi illegally and unlawfully occupied his house and its outbuildings without any rental contract nor did it pay rent to him or return the said house to him and these actions have caused him huge financial damages/loss.
21. The Applicant cites Articles 6(d) and 7(2) of the Treaty to the effect that the Government

of Burundi is required to adhere to the principles of good governance and the rule of law and that under Article 23(1) of the Treaty, the Court, as a judicial body, is required to ensure adherence to law in its role of interpretation and application of the Treaty. He contends that in the case at hand, the Government of Burundi has not adhered to Articles 6(d) and 7(2) of the Treaty, hence, this Court has jurisdiction under Article 23(1) of the Treaty to entertain and determine this Reference.

**The Respondent's Submission**

22. The Respondent contends that this Court does not have jurisdiction to entertain and determine this Reference except on matters relating to interpretation and application of the provisions of the Treaty under Articles 27(2) and 30(3).
23. He further contends that this Court in various past decisions has extensively elaborated on the fact that it is clothed with jurisdiction to interprete and apply the provisions of the Treaty including Articles 6(d) and 7(2) of the same (citing *Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba, EACJ Appeal No. 1 of 2012 and James Katabazi & 21 Others vs. The Secretary General of the EAC & The Attorney General of the Republic of Ugand, EACJ Ref. No. 1 of 2007*).
24. Based on the aforesaid, the Respondent further contends that this Court is clothed with jurisdiction to entertain and determine prayers (a) and (e) only in the Reference but does not have jurisdiction to entertain prayers (b), (c ) and (d) therein as provided for under Articles 23 and 27 read together with Article 30 of the Treaty(citing: *Hilaire Ndayizamba vs. The Attorney General of Burundi and the Secretary General of the East African Community, EACJ Ref. No.3 of 2012; and Professor Nyamoya Francois vs. the Attorney General of Burundi and the Secretary General of the East African Community, EACJ Ref. No. 8 of 2011*).

**Decision of the Court on Issue No.1**

25. We have carefully considered the rival arguments of both Parties on Issue No.1 above and we determine it as hereunder:
26. First, the issue of jurisdiction in this Reference, as argued by the Applicant and not disputed by the Respondent, in our own considered view, starts with an appreciation of Article 30(1) of the Treaty. It is the one that has mandated the Applicant as a natural person and resident of Bujumbura in Burundi, a Partner State of the East African Community, to access to this Court. The said provision 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 the Treaty."
27. Secondly, the Applicant has asserted and the Responded has conceded, that, this Court under Articles 23(1) and 27(1) of the Treaty is vested with jurisdiction on interpretation and application of the provisions of the Treaty as well as compliance with the same. We subscribe to the said view and since the Applicant asserts that there "is an infringement of Articles 6(d) and 7(2) of the Treaty … " we hold that

this Court has jurisdiction under Articles 23(1) and 27(1) read together with Article 30(1) to interprete and apply the said provisions. This Court in various past decisions has already asserted itself as regards its jurisdiction, mandate and interpretation of the provisions of the Treaty (See: *Hon. Sitenda Sebalu vs. Secretary General of the EAC & 3 Others EACJ Ref. No.1 of 2010; and Samuel Mukira Mohochi vs. AG of Uganda, EACJ Ref. No.5 of 2011*)

28. Thirdly, the Respondent, however, contends that the jurisdiction of this Court under the aforesaid provisions of the Treaty in this Reference is only applicable to prayers (a) and (e) but not prayers (b), (c) and (d) thereof. The argument of the Respondent in that regard is that prayers (b), (c) and (d) in the Reference fall outside this Court's jurisdiction as provided for under Articles 23 and 27 read together with Article 30 of the Treaty. He has cited the decisions of this Court in *Prof. Nyamoya Francois (supra) and Hilaire Ndayizamba (supra)* in support of his assertion. As regards prayers (a) and (e), the Respondent maintains that although the Court has jurisdiction over them he prayed that the same be dismissed as being time-barred. The Applicant did not respond to the aforesaid contentions of the Respondent.
29. In our considered view, we need to glance at and reproduce the prayers in the Reference to consider the Respondent's argument as advanced above. The prayers read as follows:-
    a) A declaration that the occupation by force by the Respondent of the house and outbuildings of Georges Ruhara as mentioned above is an infringement of Articles 6(d) and 7(2) of the Treaty for the Establishment of the East African Community;
    b) A declaration that the Applicant has a full right to enjoy immediately the property of his house and outbuildings;
    c) An order that the Respondent returns to the Applicant his house and outbuildings,
    d) An order that Georges Ruhara be immediately paid the total amount of BIF 930,581,069.00 by the Respondent, without prejudice to all ulterior rental owed from March, 2014 up to full settlement; and
    e) Direct that the Respondent shall pay all costs of this Reference.
30. In addressing the Respondent's contentions in the context of the above prayers, it is not the first time that this Court is faced with a contention from a respondent that the Court has jurisdiction in some of the prayers listed in a reference and that it does not have jurisdiction in others listed therein. In *Hilaire Ndayizamba (supra)*, for example, this Court considered such a contention and held thus:-

    "…. We are of the decided opinion and in agreement with the Respondents, that this Court has jurisdiction to entertain prayers (c) (b) and (e) of the Reference and that it is not clothed with the jurisdiction to grant prayers (c) and (d) since the latter clearly falls outside the Court's jurisdiction as provided for by Articles 23, 27 as read together with Article 30 of the Treaty."
31. In *Prof. Nyamoya Francois (supra)*, this Court considered a similar contention and held as follows:-

    "Without belabouring the point we hold that this Court has jurisdiction to entertain the Reference in so far as prayers (a), (b) and (e) of the Reference are concerned. As regards to 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."

32. In the present Reference, we have carefully considered the contention of the Respondent and carefully examined the provisions of Articles 23(1), 27(1) read together with Article 30(1) of the Treaty and we are in full agreement with the submission of the Respondent that this Court has jurisdiction to entertain and determine prayers (a) and (e) in the Reference but does not have jurisdiction to entertain prayers (b), (c) and (d) above because the same fall outside Articles 23, 27 and 30 of the Treaty. We so hold.
33. Fourthly, as regards the further contention of the Respondent that the Court should dismiss prayers (a) and (e) as being time-barred, we shall consider the same when considering Issue No.2 below.

    Consideration of Issue No. 2: Whether the Reference is time barred
34. The Applicant and the Respondent each submitted on the aforesaid issue as below reflected.

**The Applicant's Submission**

35. The Applicant contends that he was barred, prohibited and prevented by the military troops of Burundi from visiting his house and its outbuildings or going inside therein since the same were occupied by the said military troops and so he did not know the actual status of the said property and could not therefore place any complaint before this Court earlier. Further, that having been authorized to visit and inspect the said house, he wrote a claim letter to the Minister for Defence which was not responded to.
36. The Applicant contends further that under Article 373 of the Civil Procedure Act No.1/010 of 13/5/2004 of Burundi, once a period of more than three (3) months elapses without a response from an Administrative Authority, it is presumed to be a decision of refusal or setting aside hence the silence of the Minister for Defence is so presumed. The Applicant further contends that the Respondent did not prove at which time the Applicant was authorized to visit the house and to inspect the status of the same.
37. The Applicant also contends that given the circumstances of this matter, as has been explained above, he should not be penalized for delay to file this Reference before this Court and that in the case of *The Attorney General of the Republic of Rwanda vs. Plaxeda Rugumba, EACJ Appeal No. 1of 2012*, the Appellate Division of this Court rejected an objection on time limit because the respondent therein had failed to discharge the burden of proving existence of knowledge of the critical date on the part of the applicant in that case.
38. The Applicant, based on the aforesaid, contends that the Reference is therefore not time-barred.

**The Respondent's Submission**

39. The Respondent contends that the Reference is time-barred in terms of Article 30 (2) of the Treaty, because it has been instituted before this Court 11 years after occupation of the Applicant's house and outbuildings by the military troops since July, 2003 which is a period of more than the two months required under the said

provision of the Treaty. The Respondent avers that this is evident from the statement of the Applicant in the Reference as well as his Affidavit in support of the same.

40. The Respondent further avers that from the Applicant's statement and his supporting Affidavit, he complained that the military troops have occupied his house since July, 2003 and they have been there for 128 months upto 24th March, 2014, the date he filed this Reference and that for such occupation of the house, the Applicant is claiming a rental amount of BIF 384,000,000. The Respondent in addition contends that considering the facts stated and deponed by the Applicant himself in his pleading and Affidavit filed, it is obvious that the Reference was filed 11 years after the occupation of the house by the military troops hence, the same is time-barred without any possibility of time extension under Article 30(2) of the Treaty (citing: *Attorney General of the Republic of Uganda, the Attorney General of the Republic of Kenya vs. Omar Awadh and 6 Others, EACJ Appeal No.2 of 2012; Independent Medical Legal Unit vs. Attorney General of the Republic of Kenya EACJ Ref. No. 3 of 2010; Hilaire Ndayizamba (supra) and Professor Nyamoya Francois (supra)*.
41. The Respondent further contends that in *Prof. Nyamoya Francois' case (supra)*, the Court having dismissed the Reference because of being time-barred, it also ruled that:-

    "In light of the same 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."
42. He therefore, urged the Court to hold that the Reference is time-barred and thereafter to refrain from entertaining the remaining issues as the Reference would no longer be alive.

**Decision on Issue No.2 above**

43. We have carefully considered the rival submissions or arguments of both Parties. We have given due consideration to the Applicant's contention that his delay to file this Reference was on the ground that he was barred, prevented and prohibited from visiting and getting inside the house and its outbuildings by the military troops which had occupied the same since July, 2003. Alternatively, we have also considered the Applicant's arguments on the alleged silence of the Minister for Defence following the Applicant's letter dated 23rd October, 2013, which allegedly in terms of Article 373 of the Civil Procedure Act No.1/010 of 13/5/2004 of Burundi is taken as a refusal or setting aside of the action taken.
44. In our considered view, the Applicant's arguments are devoid of merits in face of the Respondent's arguments which we agree with, We say so because in terms of Article 30(2) of the Treaty, the Reference is time-barred having been filed beyond the period of two months provided therein. As argued and demonstrated by Mr Kayobera, Learned Counsel for the Respondent, it is clear from the statement of the Reference and the Affidavit of the Applicant that the occupation of the house and outbuildings by the military troops commenced in July, 2003 and the Reference was filed on 24th March, 2014, a period of 11 years after the said occupation.
45. In our considered view, a period of 11 years as argued by the Respondent is beyond and way above the two months period provided for under Article 30(2) of the Treaty

to institute a reference before this Court from the time the matter complained of commenced, that is the occupation of the Applicant's house and its outbuildings. On the said premise, the Applicant's contention that he was prohibited, prevented and barred by the military troops to visit and inspect the said house and that he could not therefore have filed a complaint before this Court, has no merit as it does not circumvent the issue of time limit under Article 30(2) of the Treaty. It is also his argument that the issue in contention is the failure or refusal of the Minister of Defence to return the house to the Applicant as per Article 373 of the Civil Procedure Act 01/010 of 13/5/2004 of Burundi. That argument cannot be sustained because the law that governs the issue of time limit in this matter is the Treaty and not the Civil Procedure Act No. 1/010 of 13/5/2004 of Burundi, hence it is still Article 30(2) of the Treaty which is applicable to a determination of the issue of time limit under the Treaty.

46. In conclusion, on Issue no.2, we uphold the Respondent's contention that the Reference is time-barred because it did not comply with the strict provisions of Article 30(2) of the Treaty. This finding takes care of the Respondent's prayer to this Court to dismiss the Applicant's prayers (a) and (e) in the Reference. Having said so, and as held by this Court in *Prof. Nyamoya Francois (supra)*, we refrain from entertaining the remaining issues for one obvious and simple reason that the Reference is no longer alive and any attempt at determining those remaining issues will be a mere academic exercise.

**Disposition**

47. Having found that the Reference is time-barred and having declined the invitation to address its merits or otherwise, it follows that the final orders to be made are that the Reference herein is hereby struck out.
48. We now come to the issue of costs. Costs are usually at the discretion of the Court. We have taken note of the circumstances in which the Applicant has been subjected to in respect of his house and its outbuildings such that it may not be fair and just to subject him to costs in this Reference. In exercise of our discretion, we order and direct that each Party should bear his or its own costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Reference No. 17 of 2014

**Rt. Hon. Margaret Zziwa And The Secretary General, East African Community**

Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Faustin Ntezelyayo J; Fakihi A. Jundu, J & Audace Ngiye J
November 6, 2015

*Preliminary Objection – Production of evidence - Whether an order of the Court could be ousted by section 20 of the EALA (Powers and Privileges) Act - Witness summons*

*Articles: 30, 61(2) of the Treaty for the Establishment of the East African Community – Sections; 2, 20, of the East Africa Legislative Assembly (Powers and Privileges) Act, 2003 - Rule 56(1) of the East African Court of Justice Rules of Procedure, 2013*

The Respondent raised a preliminary objection contending that: section 20 of the East Africa Legislative Assembly (Powers and Privileges) Act required any Member or Officer of EALA that sought adduce evidence in any court of the proceedings of EALA or its Committees to obtain special leave of the Assembly prior to doing so; and that the applicant could not adduce evidence from EALA.

In reply, the Applicant argued that if the intention had been to either oust the jurisdiction of EACJ or to forestall the tendering of evidence in respect of EALA proceedings, the East Africa Legislative Assembly (Powers and Privileges) Act would have expressly provided for this.

**Held**

1) The EALA (Powers and Privileges) Act was legally enacted under Article 61 of the Treaty and was, therefore, valid and applicable law within the Court's territorial jurisdiction.
2) Any member or officer of the Assembly, or persons employed to take minutes or record evidence before it or a Committee must comply with the provisions of section 20 of the Powers and Privileges Act. Thus, special leave of the Assembly must be obtained to adduce evidence contained in the contents of minutes, oral evidence, documentation, proceedings or examination laid before the Assembly or a Committee of the Assembly.
3) It was not established that the evidence the Applicant intended to adduce before the Court fell within the ambit of section 20 thus it would be premature to forestall the Applicant's evidence on the pretext that it did not comply with the provisions of section 20.
4) The documentation produced by the Clerk to the Assembly was properly on record pursuant to a witness summons which is a valid Court Order. The Clerk had a legal obligation to appear as a witness in this matter pursuant to the Order without need for the special leave of the Assembly.

**Cases cited:**

Calist Mwatela & 2 Others v The Secretary General of the EAC Ref. No. 1 of 2005 (distinguished)

Hon. Zachary Olum& Another v The Attorney General of Uganda, Constitutional Petition No. 6 of 1999 (not applicable)

James Katabazi & 21 Others v Secretary General of the EAC & Another Ref. No. 1 of 2007

Simon Peter Ochieng & Another v Attorney General of Uganda Ref. No. 11 of 2013

**Ruling**

1. The above Reference was scheduled for hearing of oral evidence on 8th and 9th September 2015. However, on 8th September 2015, the Respondent raised a preliminary point of law premised on Section 20 of the East Africa Legislative Assembly (Powers and Privileges) Act, 2003; the gist of which was that the Applicant and her witnesses were members and/ or officers of the East Africa Legislative Assembly (EALA) but had not secured leave from the Assembly to adduce evidence before this Court. This Court did at first instance find that the preliminary point of law was improperly raised before it given that it contravened the spirit of Rule 41(2) of the East African Court of Justice Rules of Procedure (hereinafter referred to as 'the Rules'), which essentially is to avert trial by ambush and the attendant delays to proceedings before this Court.
2. When the matter resumed with the hearing of the Applicant's oral evidence, learned Counsel for the Respondent did again raise the question of whether she had express leave from EALA to adduce evidence before this Court. The Court did thereupon order the Respondent to file a formal Notice of Preliminary Objection in this matter and the said Objection would be heard on 9th September 2015. At the hearing of the Objection, the Applicant was represented by Mr. Justin Semuyaba while Mr. Stephen Agaba appeared for the Respondent.
3. In a nutshell, it was the Respondent's contention that the East Africa Legislative Assembly (Powers and Privileges) Act, 2003 had been enacted under Article 61(2) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty') in order to preserve the sanctity of the Assembly (EALA) and protect the principle of separation of powers. Against that background, Mr. Agaba contended that section 20 of the East Africa Legislative Assembly (Powers and Privileges) Act did not contravene the Treaty, but rather enjoined any Member or Officer of EALA that sought to attest to proceedings in the Assembly or a Committee thereof to secure the special leave of the Assembly prior to doing so in any court or elsewhere outside the Assembly.
4. In response to questions from the Bench, Mr. Agaba abandoned the second leg of the Preliminary Objection where the Respondent had sought to invoke section 32 of the East Africa Legislative Assembly (Powers and Privileges) Act as a bar to the submission to any court by the Speaker or Clerk to the Assembly. Nonetheless, learned Counsel did maintain that whereas Article 30 of the Treaty authorized Members of EALA to institute proceedings before this Court, they were not at liberty to adduce evidence on the Assembly's proceedings in Court without the leave of the Assembly.

5. Conversely, the Applicant contended that the Treaty, as the *grund norm* of the East African Community (EAC), took precedence over statutes promulgated by the Community and, to the extent that Article 30 thereof granted her l*ocus standi* to file a matter before this Court, she was acting within her legal rights to adduce evidence in support of her case. Mr. Semuyaba further argued that whereas the Respondent sought to rely upon section 20 of the EALA (Powers and Privileges) Act to deny the Applicant the opportunity to adduce evidence before this Court without leave of the Assembly, section 36 of the same Act permitted a copy of a journal printed or purporting to be printed in the official gazette of the Community to be admitted in all courts without proof that it had been so printed. Learned Counsel referred this Court to section 2 of the Act that defined the term 'journal' to include minutes of the Assembly or the official record of the Assembly's proceedings. We understood Mr. Semuyaba to contend that the said journal was already on the Court record having been so admitted and allotted exhibit numbers; had been formally sought from the Clerk to the Assembly pursuant to an application that was granted by this Court on 6th May 2015, and the same Clerk had since been issued with witness summons by dint of the same Court Order. In learned Counsel's view, therefore, the Respondent could not be heard to object to the Clerk's appearance as a witness.
6. Mr. Semuyaba referred us to numerous authorities in support of his argument that parliamentary privilege was not absolute; rather, that this Court did have jurisdiction to inquire into the legality of the Assembly's proceedings. We deem it necessary to make specific mention of two (2) cases that were cited by learned Counsel for the Applicant, namely, *Hon. Zachary Olum & Another vs. The Attorney General of Uganda Constitutional Petition No. 6 of 1999 and Calist Mwatela & 2 Others vs. The Secretary General of the EAC Ref. No. 1 of 2005*. According to Mr. Semuyaba, the gist of the decision in *Hon. Zachary Olum (supra)* was that requiring anybody to seek leave of the Speaker of Parliament prior to adducing evidence in Court was a denial of access to justice and information, and therefore a violation of the fundamental rule of natural justice. We also understood learned Counsel to argue that since the Applicants in *Calist Mwatela (supra)*, who at the time were sitting members of EALA, were able to adduce evidence without recourse to section 20 of the EALA (Powers and Privileges) Act; the same privilege should pertain to the present Applicant. We shall revert to these cases later in this judgment.
7. In response to questions from the Bench, Mr. Semuyaba argued that if the intention of the Legislature had been to either oust the jurisdiction of this Court or forestall the tendering of evidence in respect of EALA proceedings before it, the East Africa Legislative Assembly (Powers and Privileges) Act would have made express provision for such eventualities. Learned Counsel maintained that this Court did have the jurisdiction to entertain any matter to do with Treaty interpretation or application such as the Reference in issue presently, and the only way such a matter could be proven was by evidence. Further, we understood Mr. Semuyaba to reiterate his contention that this Court had issued witness summons to the Clerk of the Assembly under express purview to produce certain documents and the said documents had since been admitted on the Court record, therefore the Respondent could not stop the Court from entertaining the said evidence. In any event, in learned Counsel's

opinion, the case of *Calist Mwatela & 2 Others (supra)* had set a precedent where evidence of the Assembly's proceedings could not be blocked under pretext of the EALA (Powers and Privileges) Act. Finally, Mr. Semuyaba affirmed that the Applicant had not applied for the purportedly requisite leave for her witnesses to adduce evidence before this Court.

8. In Reply, learned Counsel for the Respondent contended that the issue before this Court was not whether or not this Court had jurisdiction to entertain the Reference or indeed whether the Applicant had locus standi to institute the said Reference, but rather whether the Applicant and such of her witnesses that were affected by section 20 of the EALA (Powers and Privileges) Act had complied with the said legal provision. Mr. Agaba reiterated his earlier position that the Applicant and her witnesses were at liberty to adduce whatsoever evidence they wished to present provided they secured the requisite leave from the Assembly to do so. With regard to section 36 of the same Act, learned Counsel argued that not all journals of the Assembly were printed in the EAC Gazette therefore, in his view, whereas section 36 pertained to the Gazette of the Community, the journals and Hansard of the Assembly were not necessarily printed therein.
9. Mr. Agaba took issue with the authorities cited by opposite Counsel, arguing that they were inapplicable to the present Preliminary Objection. He distinguished the case of *Hon. Zachary Olum (supra)* from the present circumstances, arguing that in the cited case the Parliament of Uganda did not have procedures on how the leave sought would be granted which the Applicant had not demonstrated to be the case presently. In the same vein, Mr. Agaba contended that learned Counsel for the Applicant had not demonstrated to this Court that the Applicants in the *Calist Mwatela case* had not secured the requisite leave. He further argued that even if the Applicants in that case had not secured the said leave, two wrongs did not make a right.
10. In response to questions from the Bench, Mr. Agaba could not confirm whether or not the documentary evidence that the Clerk to the Assembly had been ordered to present to this Court had, in fact, been gazetted within the precincts of section 36 of the East Africa Legislative Assembly (Powers and Privileges) Act. Learned Counsel argued that, having been summoned by Court Order, the Clerk was obliged to obey the Court Order but did also require leave of the Assembly to so appear. In an attempt to distinguish the terms 'elsewhere' in section 20(1) and 'place' in section 36, Mr. Agaba argued that whereas documents that were published in the Community Gazette referred to in section 36 of the said Act could be tendered in any place, journals and Hansards of the Assembly were not necessarily published in the said Gazette. Finally, learned Counsel did seem to agree that it would be premature to refuse a witness to testify before this Court before it had been established that his or her evidence did, in fact, fall within the ambit of the restrictions in section 20 of the Act.
11. We must state from the onset that we do agree with learned Counsel for the Respondent that the EALA (Powers and Privileges) Act was legally enacted under Article 61 of the Treaty and is, therefore, valid and applicable law within this Court's territorial jurisdiction.
12. Section 20(1) of the said law provides:

"Notwithstanding the provisions of any other law, no member or officer of the Assembly and no person employed to take minutes or record evidence before the Assembly or any Committee shall, except as provided in this Act, give evidence elsewhere in respect of the contents of such minutes or evidence or of the contents of any documents laid before the Assembly or such Committee, as the case may be, or in respect of any proceedings or examination held before the Assembly or such Committee, as the case may be, without special leave of the Assembly first had and obtained in writing."

13. Section 20(1) thus prohibits the tendering 'elsewhere' of evidence pertaining to the contents of minutes, evidence, documentation, proceedings or examination laid before or arising in the Assembly or a Committee thereof without the special leave of the Assembly in writing. The said prohibition relates to the following categories of people – members and officers of the Assembly, as well as persons employed to take minutes or record evidence before the Assembly or a Committee thereof.
14. Learned Counsel for the Respondent did argue that the term 'elsewhere' within the context of the EALA (Powers and Privileges) Act meant elsewhere other than the Assembly itself. Given that section 20 falls under Part IV of the Act, which generally provides for evidence in EALA, we cannot fault Mr. Agaba on this interpretation of the term. It does seem logical to conclude that the prohibition in section 20(1) applies to evidence that is sought to be given anywhere else other than before the Assembly or a Committee thereof. The question would be the nature of the evidence that falls within the ambit of the prohibition in section 20(1), and whether or not this Court can at this stage of the proceedings reasonably deduce the Applicant's evidence to fall within the said category of evidence. Stated differently, what is in issue before us presently is the extent to which section 20(1) applies to the circumstances of this case.
15. In the case of *James Katabazi & 21 Others vs. Secretary General of the EAC & Another Ref. No. 1 of 2007* the notion of rule of law in its most basic form was depicted as 'the principle that nobody is above the law.' The Court in *Katabazi (supra)* did also acknowledge the overriding consideration in the theory of the rule of law as 'the idea that both the rulers and the governed are equally subject to the law of the land.'
16. For present purposes, therefore, we find untenable Mr. Semuyaba's argument that requiring anybody to seek leave of the Speaker of Assembly prior to adducing evidence in Court per se is a denial of access to justice and information, and therefore a violation of the fundamental rule of natural justice. It seems apparent to us that for as long as the EALA (Powers and Privileges) Act remains on the Community's statute books, it must be complied with by all persons within the Community's territorial jurisdiction, leaders and governed alike. Consequently, any member of the Assembly would be just as bound by the provisions thereof as the Community's leaders or citizens. We are unable to appreciate how compliance with valid laws of the Community translates into a violation of the principle of natural justice that forms an integral tenet of the notion of rule of law. In any event, given that the Applicant has not made any attempt to seek the requisite leave, it would be premature to portend that she had been denied access to justice. The unreasonable denial by the Assembly of the leave sought therefrom would be another matter.

17. We deem it necessary at this stage to address the issues arising from the *Calist Mwatela case* as raised by learned Counsel for the Applicant. In that case, three (3) members of EALA did file a Reference under Article 30 of the Treaty challenging the validity of a meeting of the Sectoral Council on Legal and Judicial Affairs held between 13th – 16th September 2005, as well as the decisions taken by the said meeting in relation to Bills then pending before the Assembly. It is noteworthy that at the time of filing the said Reference the EALA (Powers and Privileges) Act was already in force, having been enacted into law in 2003. The Reference was supported by affidavits deponed by all 3 Applicants, but the legality thereof was not challenged by the Respondent therein.
18. We have carefully considered the judgment in the above Reference. Clearly the question as to whether or not sitting members of the Assembly could legally adduce evidence in court without leave of the Assembly was neither framed as an issue in that case, nor canvassed by any of the parties or addressed by the Court. Consequently, with respect, we do not share Mr. Semuyaba's view herein that *Calist Mwatela (supra)* had set a precedent where evidence of the Assembly's proceedings could not be blocked on account of the EALA (Powers and Privileges) Act. That issue was not considered at all in that case. It has now arisen in the present case and learned Counsel did concede that the Applicant herein had not sought the requisite leave. We take the view that it is inconceivable for this Court to sit idly by and perpetuate non-compliance with the EALA (Powers and Privileges) Act on the pretext that in *Calist Mwatela (supra)* sitting members of EALA were able to adduce evidence without recourse to section 20 of the EALA (Powers and Privileges) Act. That would amount to an abdication of our judicial duty, an eventuality that this Court cannot and shall not contemplate.
19. In the result, we are satisfied that any member or officer of the Assembly, as well as persons employed to take minutes or record evidence before it or a Committee thereof must comply with the provisions of section 20 of the Act with regard to securing special leave from the Assembly.
20. Be that as it may, as depicted above, the evidence that must be subjected to the leave of the Assembly before it can be adduced elsewhere includes contents of minutes, oral evidence, documentation, proceedings or examination laid before or arising in the Assembly or a Committee thereof. The import of this provision is two-fold. First, it clearly suggests that evidence that falls outside the foregoing parameters can be adduced without the leave of the Assembly. Thus, for present purposes, the Applicant would be acting well within her legal rights to adduce evidence before this Court that has nothing to do with the minutes, evidence, documentation, proceedings or examination laid before or arising in the Assembly or a Committee thereof. Secondly, section 20(1) expressly prohibits the tendering of the contents of this evidence and not the evidence *per se*. Thus, in principle, reference may be made to minutes or documentation placed before the Assembly without adducing the contents thereof as captured in a specific Minute, and similarly reference may be made to the proceedings of the Assembly without relaying the specific contents of such proceedings as captured by the Hansard. That is not to say that mere reference to such documentation is sufficient proof thereof; rather, as we have stated hereinabove, proof of the documents

enlisted in section 20 would necessitate their production with the requisite leave of the Assembly.

21. In the instant case, the Applicant opted to give oral evidence as opposed to evidence by affidavit. This course of action is provided for by Rule 65(1) of this Court's Rules of Procedure. Had she adduced affidavit evidence it would have been inordinately clear whether or not her evidence ran afoul of the provisions of section 20 of the EALA (Powers and Privileges) Act. This Court would have been quite capable of making a determination on the face of the affidavits that she had attested to matters within the ambit of section 20 without special leave from the Assembly. The present circumstances, however, are such that it would be tantamount to pre-empting the Applicant's oral evidence to presume that she was going to attest to matters that can only be attested to with the special leave of the Assembly. Section 20 is not couched in language that prevents members of the Assembly from testifying in courts at all regardless of the nature and import of their evidence. It is couched in terms that define the parameters of the restriction ingrained therein. We have defined the Court's construction of the said parameters hereinabove. Without the benefit of the present Applicant's oral evidence or that of any of her intended witnesses, therefore, it would be premature to adjudge the Applicant's evidence as running afoul of section 20 of the EALA (Powers and Privileges) Act, and prevent her from testifying in Reference No. 17 of 2014. We so hold.
22. We now revert to the documentation presented to the Court by the Clerk to the Assembly. The facts of the present case are that the Clerk to the Assembly did produce documentation pursuant to a Court Order to that effect and the said documentation was admitted on the Court record. The said documentation was produced pursuant to summons issued by this Court following an application for that purpose by the Applicant that was not contested by the Respondent.
23. Rule 56(1) of the East African Court of Justice Rules of Procedure provides for the production of documents before this Court as follows:
"Any party in a claim or reference may obtain on application to the Court, summons to any person whose attendance is required either to give evidence or to produce documents."
24. With regard to non-compliance, Rule 56(4) of the Rules provides:
"Where a person summoned to give evidence or produce a document fails to appear or refuses to give evidence or to produce the document the Court may in its discretion impose upon the witness a pecuniary penalty not exceeding USD 200."
25. Therefore, the Order that emanates from Rule 56(1) is tantamount to witness summons compelling a person to give evidence or produce documents in his or her possession, failure of which s/he would be penalized. Thus, in the present case, the Clerk to the Assembly was compelled to produce documentation in his custody. He did indeed dutifully produce the required documentation and it was duly admitted on the Court record. Against that background, we do find it pertinent to consider the import of the prohibitions contained in section 20 of the EALA (Powers and Privileges) Act viz the essence of the witness summons issued under Rule 56(1) of this Court's Rules.
26. Rule 56(2) of the Rules prescribe specificity of the witness summons as to whether or

not a witness' attendance is required at trial. It reads:

"Every witness summons shall specify the time and place of attendance, and whether attendance is required for purposes of giving evidence or to produce a document, or for both purposes. The summons shall describe with reasonable accuracy the document required."

27. In the present case, the witness summons that were issued read as follows:
"Whereas your attendance is required to give evidence and/or provide documents described as:
i. The legal opinion given by the Counsel to the Community whether to Chair the fateful sitting in Nairobi.
ii. The proceedings of the Legal Rules and Privileges Committee.
iii. The proceedings of the sitting of the Assembly of 18th December 2014.
On behalf of Rt. Hon. Margaret Zziwa, the Applicant in the above case/ Reference, you are hereby required (personally) to appear before this Court on the 8th and 9th September 2015 at 9.30 o' clock in the forenoon, and/or to such other date to which the case may stand adjourned, and not to depart thence without the leave of Court.
If you fail to comply with this Order without lawful excuse, you will be subject to the consequences of non-attendance laid down in Rule 56(4) of the East African Court of Justice Rules, 2013. …"
28. Clearly, the witness summons did specify that the Clerk was required to produce the sought documentation and appear in person at the trial. Indeed, the documentation he produced was admitted on the Court record pursuant to the same Order. The question then is whether that Order of Court can be ousted by the provisions of section 20 of the EALA (Powers and Privileges) Act.
29. Though not defined in this Court's Rules, it is well recognized that witness summons amount to court process, the non-compliance with which would amount to contempt of court. This is aptly captured by *Halsbury's Laws of England, 2001 Reissue, Vol 9(1), para. 458, p.55* in the following terms:
"Disobedience to process.
It is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of the court within the time specified in the judgment or order."
30. We do recognize that the legal provision for witness summons and/ or Orders for the production of documents is outlined in the procedural Rules of the Court, which are tantamount to subsidiary legislation viz the EALA (Powers and Privileges) Act. However, we do also note that good governance and rule of law are well articulated in Articles 6(d) and 7(2) of the Treaty as governing principles to which the East African Community committed to observe. We reproduce the said Articles below for ease of reference:
Article 6(d)
"The fundamental principles that shall govern the achievements of the objectives of the Community by the Partner States shall include:
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."

Article 7(2)

"The Partner States shall 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."

31. As we did state earlier herein, the notion of rule of law hinges on the basic premise that no single person (natural, corporate or otherwise) is above the law, the rulers and the governed both being equally subject to the law of the land. See *Katabazi (supra)*. For present purposes, in our considered view, the notion of good governance is correspondingly rooted in the demonstrable respect for the rule of law. To our minds, respect for due court process is an important tenet of respect for and observation of the rule of law and good governance principles. In the same vein, the recognition accorded to the Court by the Treaty, as well as the Court's role in ensuring adherence to the law in Treaty application and compliance cannot be over-emphasized. Thus Article 23(1) of the Treaty pronounces the function of the Court as a judicial body vested with the mandate to 'ensure the adherence to the law in the interpretation, application of and compliance with the Treaty.'
32. Furthermore, we are constrained to point out that just like the enactment of the EALA (Powers and Privileges) Act is rooted in Article 61(2) of the Treaty; the Rules of Procedure of the Court are similarly premised on Article 42(1) of the Treaty. They are intended to 'regulate the detailed conduct of the business of the Court.' To that extent, they preserve the sanctity and legitimacy of the Court. Judicial functions are of necessity premised on the presentation of cogent and credible evidence. It cannot be suggested, therefore, that court process – such as witness summons – that give effect to the Court's mandate as established by the Treaty can be ousted by an Act of the Assembly. On the contrary, as we have endeavoured to demonstrate above, the Court's Rules of Procedure derive their legitimacy directly from the Treaty.
33. We find it pertinent to reproduce the following Article by Lord Justice Gross, '*The Judiciary: The Third Branch of the State*' *(April 2014)* as cited with approval by this Court in the case of *Simon Peter Ochieng & Another vs. Attorney General of Uganda Ref. No. 11 of 2013*:

"The proper and effective functioning of any State committed to the rule of law depends on its branches understanding and being respectful of each other's respective roles and functions. Understanding is the basis from which the branches can work together within a framework of separation of powers to maintain … the rule of law."

34. We take the view that the foregoing jurisprudence aptly captures the equal and unequivocal recognition of the function of each organ of the Community in the governance thereof, and informs the interrelation between the different branches of governance in the Community. It is a non-negotiable tenet of the rule of law that all court orders must be respected and obeyed. They are not issued in vain and are binding on the subjects thereof unless and until successfully challenged by related court action.
35. In the result, we are satisfied that the documentation produced by the Clerk to the Assembly is properly on record pursuant to a valid Court Order, and the said Clerk is under a legal obligation to appear as a witness in this matter pursuant to the same

Order without need for the special leave of the Assembly. In any event, should he of his own volition deem it necessary to seek leave of the Assembly the onus would be upon him, having been duly served with witness summons, to secure the said leave.

36. Before we take leave of this issue we propose to address the question of the journal in so far as it applies to the matter before us presently. Section 36reads as follows:
"A copy of the Journal printed or purporting to be printed in the Official Gazette of the Community shall be admitted in evidence in all courts and places without any proof being given that such copy was so published."
37. On the other hand, section 2 defines journals to mean 'the minutes of the Assembly or the official record of the proceedings.'
38. It seems to us that Mr. Semuyaba's argument that the documentation that was produced by the Clerk amounted to 'the' journal is unsustainable. It was not supported by any evidence beyond this submission from the bar. We, similarly, did not find any evidence to support Mr. Agaba's contention that not all journals of the Assembly were printed in the EAC Gazette. In our view, a literal interpretation of sections 2 and 36 would suggest that journals were the official record of the proceedings akin to what is referred to as 'Hansards' in other jurisdictions which, once printed in the Official Gazette of the Community, were admissible in evidence without need to prove the fact of publication. This interpretation would portend that publication in the Official Gazette was sufficient for purpose of the admissibility of journals in evidence without need for further proof thereof, and therefore the Official Gazette was conclusive proof of the authenticity of journals published therein. Be that as it may, we do not find section 36 relevant to the present case as none of the documentation or journals produced before this Court were proven to have been published in the Official Gazette.
39. Finally, we deem it necessary to address the arguments of learned Counsel for the Applicant with regard to the position advanced in *Hon. Zachary Olum (supra)*. We have carefully considered the decision in that case. The issue therein for present purposes was whether section 15 of Uganda's National Assembly (Powers and Privileges) Act, which prohibited members and designated employees of Parliament from using evidence of proceedings in the Assembly or its Committee elsewhere without the special leave of the Assembly having first been obtained, was unconstitutional. The majority decision in that case was that the said legal provision was unconstitutional. The reasons advanced for this position were as follows.
"It is therefore well entrenched in the legal system that the State may not derogate from its obligations to ensure that a citizen has a fair trial, which entitles him an opportunity to avail himself of all necessary material in support of his case. Section 15 therefore is in conflict with Articles 28 and 44(c) when it leaves the decision to grant leave to obtain information to Parliament." (per Mpagi Bahigeine JA)
"In my view, in such a society section 15 cannot be justified because it derogates on the right to fair hearing. Subjecting the exercise of a guaranteed right to the permission of another authority is derogation. It is prohibited by Article 44(c) of the Constitution." (per Okello JA)
"A provision that denies honourable members of Parliament, together with those they represent, access to information that is otherwise readily available to the public

cannot enhance the prestige or dignity of Parliament." (per Twinomujuni JA)

40. As can be deduced from the foregoing judgment excerpts, in that case the constitutionality of section 15 of the National Assembly (Powers and Privileges) Act was in issue. Section 15 is apparently the equivalent of section 20 of the EALA (Powers and Privileges) Act. Nonetheless, in the matter before us the question as to whether or not section 20 is in compliance with the Treaty was not in issue. It was never raised in pleadings in *Reference No. 17 of 2014*, from which the present preliminary objections originate. Therefore, we do not find the decision therein applicable to a determination of the Applicant's compliance with a validly existing law, which was the issue under consideration presently.
41. In conclusion, we find that it has not been satisfactorily established before us that the evidence the Applicant intends to adduce before this Court does, in fact, fall within the ambit of section 20 of the EALA (Powers and Privileges) Act. We take the view that it would be premature at this stage to forestall her evidence on the pretext that it does not comply with the provisions of section 20 of the said Act. We do, nonetheless, reiterate our position herein that the Act is valid Community law and must be complied with by all witnesses that seek to adduce evidence that falls within the parameters thereof. The only exception in this regard would be the Clerk to the Assembly who, as we have held hereinabove, was summoned as a witness in this matter pursuant to a Court Order.
42. In the final result, we do hereby over-rule the objections raised by the Respondent with costs to the Applicant.

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East African Court of Justice – First Instance Division
Application No. 2 of 2014

Arising from Reference No. 7 of 2013

**FORSC, FOCODE, PEN Kenya Centre, PALU, PEN International, Reporters sans Frontiers and World Association of News Papers and News Publishers**

**And**

**Burundian Journalists' Union and The Attorney-General of the Republic of Burundi**

I. Lenaola, DPJ; J. Mkwawa, J (Rtd); F. Ntezilyayo J
August 15, 2014

*Cogent submissions - Exercise of judicial discretion- Expertise and knowledge- Impartiality – Onerous duty- Role of Amici curiae.*

*Rule 36 of the East African Court of Justice Rules of Procedure, 2013.*

The Applicants are civil society groups and Non-Governmental Organisations operating within and beyond the borders of the Republic of Burundi. They sought leave to participate as amici curiae in Reference No. 7 of 2013 fled by the Burundian Journalists' Union challenging several laws which they allege contravened freedom of expression and of the press in Burundi. The Applicants claimed to have expertise in the promotion of freedom of expression and press freedom.

The 2nd Respondent opposed their application averring that they had not provided documentary proof of their mandates and of the relevance of their contribution in the dispute before the Court.

**Held:** The Court addressed the question was whether or not the Applicants' should be admitted as amici curiae and stated that an amicus is a friend of the Court and that the Court can only take what it considers relevant and non-partisan from the amicus and the ultimate control over what the amicus can do is the Court itself.

The amicus has the onerous duty of ensuring that it gives only the most cogent and impartial information to the Court or risk losing the respect and friendship of the Court in future proceedings. It was in the wider interests of justice that the Applicants were admitted as amici curiae. Their role was limited to the filing of only one set of submissions within a defined timeframe.

**Cases cited:**
Avocats Sans Frontier v Mbugua Mureithi wa Nyambura, EACJ Application No. 2 of 2013
Dritoo v Nile District Administration [1968] E.A 428

Fose v Minister of Safety and Security 1977(30) SA 786 (CC)
Mbogo v Shah (1968) E.A 93
Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and others 2002 (5) SA 713 (CC)

**Ruling**

1. The Applicants herein, Forum pour Renforcement de la Société Civile ("FORSC"), the International Press Institute, Maison de la Presse du Burundi, Forum pour la conscience et le development (FOCODE), PEN Kenya Centre, Pan African Lawyers Union (PALU), PEN International, Reporters sans frontères and the World Association of Newspapers and News Publishers (WAN – IFRA) are all civil society groups and Non-Governmental Organisations operating within and without the borders of the Republic of Burundi.
2. By their joint Notice of Motion dated 7th February 2014, they have sought leave pursuant to the provisions of Rule 36 of the East African Court of Justice Rules of Procedure, 2013 to be allowed to participate in Reference No. 7 of 2013 as *amici curiae*.
3. For avoidance of doubt, the above Reference challenges *inter-alia* Law 1/11 of 4th June 2013 amending Law 1/25 of 27th November 2003 which governs the Press Sector in Burundi and it is their case that numerous provisions of that law are contrary to the freedoms of expression and of the press within the meaning of Articles 6 (d) and 7 (2) of the Treaty for the Establishment of the East African Community (hereinafter,"the Treaty").
4. In the Notice of Motion aforesaid, it is the Applicants' claim that they all have a genuine commitment to promoting respect for and observance of the freedoms of expression and of the press and in that regard they have acquired valuable expertise in that area of law. They therefore seek to be enjoined as amici curiae to assist the court on two issues;
   (i) Identifying and explaining the types of regulation of the media that constitute an infringement on press freedom;
   (ii) Offering reasons why the Freedoms of Speech and of the Press are essential components of both the fundamental principles of the EAC contained in Article 6 (d) of the Treaty and the Operational Principles of the Community set out in Article 7 (2) of the Treaty.
5. In addition, it is their case as set out in the Affidavit and submissions of Vital Nshimirimana, President of FORSC, that the Applicants as *amici* will provide a distinct and helpful international and comparative perspective in the Reference and will offer useful, focused and principled legal submissions to assist the Court in interpreting and applying the Treaty.
6. The 1st Respondent, the Burundian Journalists Union by their Reply to the Motion, filed on 12th June 2014 and in submissions by its Counsel, Mr. Deya, expressed that it had no objection to the admission of the Applicants as *amici curiae*. In addition, Mr. Deya stated that the jurisprudence of the Court will be greatly enhanced by the submissions to be tendered by the Applicants as has happened in the past whenever

an amicus curiae was admitted to participate in proceedings.

7. Mr. Deya also made the point that by admitting the Applicants to the proceedings, the number of stakeholders that have a direct interest and experience in the Court will be increased and the rule of law would also be advanced amongst the citizens of the EAC and the international community at large.
8. The 2nd Respondent, the Attorney-General of the Republic of Burundi, by his Response filed on 9th June 2014 and relevant to the present Application, argued that the Applicants, while claiming that they have expertise in the area of press freedom, have submitted no legal documents to support that claim.
9. Further, that the Court is fully mandated and has such legal expertise to enable it interpret the Treaty without any assistance, from anyone, least of all from the Applicants whose claim to expertise is unfounded. In any event, that, if the Court requires any assistance, the Parties to Reference No. 7 of 2013 would render such assistance and so the Applicants' offer of assistance is unmerited.
10. Lastly, that the Applicants' submissions would not only duplicate those of the Applicants in the Reference but would also unnecessarily increase the costs to be incurred by the 2nd Respondent in responding to the Reference.

In his submissions, Mr. Kayobera for the 2nd Respondent also made the point that because there is no statement from each of the Applicants to show their specific interests in the Reference, then their claims are rendered worthless and in any event that they have also failed to produce their Constitutions or documents of registration to show the Court what their mandates are and of what relevance their contribution would be to the dispute before the Court..

11. In the end, the 2nd Respondent strongly opposes the Application and prays that it should be dismissed with costs.
12. On our part, we have carefully considered the rival submissions before us and we must begin by addressing our minds to the fact that the admission or non-admission of an amicus curiae to any judicial proceeding is a matter of discretion. In that regard, this Court in *Avocats Sans Frontier vs Mbugua Mureithi wa Nyambura, Application No. 2/2013* cited with approval the decision of Fuad J. in *Dritoo vs Nile District Administration [1968] E.A 428* where he stated thus:
    "The Court has a wide discretion to ask for assistance of a curiae if it considers that the interests of justice would be served."
13. Discretion, as we understand it, must always be exercised in a judicious manner based on the facts placed before the Court and not on extraneous matters which, if looked at objectively, would cause injustice to one party – see *Mbogo vs Shah (1968) E.A 93 at 96 per Newbold, P.*
14. This discretion is also codified in Rule 36 (4) which provides that if an application for leave to appear as amicus curiae is found to be "justified", the Court shall allow the application and fix the time which the statement by the amicus curiae should be filed.
15. In addition, as was stated in *Fose vs Minister of Safety and Security 1977(30) SA 786 (CC)*, an *amicus* must have an interest in the proceedings and its submissions must be relevant to the proceedings and raise new contentions which may be useful to the Court.
16. The role of an amicus in proceedings was even more clearly defined by the

Constitutional Court of South Africa in *Re Certain Amicus Curiae Applications: Minister of Health and Others vs Treatment Action Campaign and others 2002 (5) SA 713 (CC)* at para.5 where it stated thus;

"The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact and to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court."

17. We are in agreement with the Learned Judges and that the question that we must pose at this stage is, have the Applicants met the above test? Firstly, whereas it is true that no document has been filed to show what the Applicants individually do, there is a statement of Interest made on their behalf by Mr. Vital Nshimirimana, an advocate and who is an officer of this Court. We take his word on the subject and more critically, the 2nd Respondent has not shown that the Applicants do not exist and Mr. Kayobera in his submissions actually conceded that he knows of some of the Applicants as active in the Burundian Civil Society.
18. Secondly, looking at the Applicants' Statement of Interest again, it is clear to us that they have knowledge of and are involved in matters relating to press freedom generally and this Court can take judicial notice that PEN International, International Press Institute and PEN Kenya Centre for example are well known for their involvement in matters relating to the freedom of the press.
19. Thirdly, we are in agreement with Mr. Deya that a Court such as this one which is in the process of settling its jurisprudence will benefit from any assistance from experts and groups with relevant experience and expertise in relevant areas of law and so to turn away the Applicants merely because they have not filed a more comprehensive statement of interest would not be a progressive move on the part of the Court.
20. Fourthly, an *amicus* is a friend of the Court and the Court can only take what it considers relevant and non-partisan from the amicus and the ultimate control over what the amicus can do is the Court itself. The amicus has on the other hand, the onerous duty of ensuring that it gives only the most cogent and impartial information to the Court or risk losing the respect and friendship of the Court in future proceedings.
21. Fifthly, in the present Application, the 2nd Respondent's fears that all the Applicants will file individual briefs and thereby tax him in responding to all of them are in our considered view, misplaced, to say the least. There shall be only one brief by the Applicants and we see no prejudice to be caused to the 2nd Respondent thereby.
22. Lastly, looking at Reference No. 7 of 2013 and noting the issues in contest, it would be in the wider interests of justice that we admit the Applicants as amicus curiae and their role shall be limited to the filing of only one set of submissions within the timeframe to be determined by this Court.
23. As for costs, bearing in mind the facts and circumstances of the case, we see no reason to make any order in that regard and so each party shall bear its own costs.

Orders accordingly.

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East African Court of Justice – First Instance Division
Application No. 4 of 2014

Arising from Reference No. 2 of 2014

In the Matter of Conferring a Judiciary Jurisdiction to the Executive

And

In the Matter of denying the principle of the independence of the judiciary

And

In the matter of denying the right to a fair trial
And

In the matter of a breach of the fundamental and operational principles of the treaty for the establishment of the east African community by the republic of Burundi

**The UPRONA Party, Mr. Gabriel Sinarinzi and Mr. Onesime Kabayabaya**

**And**

**Attorney General of the Republic of Burundi and The Secretary General of the East African Community**

Before: I. Lenaola, DPJ; J. Mkwawa, J (Rtd); F. Ntezilyayo, J
August 15, 2014

*Interim Orders for stay of the enforcement of an Act establishng the National Commission for Lands and other Assets, Burundi - Unfettered discretion - Wider interests of justice.*

*Article 39 of the Treaty for the Establishment of the East African Community - Rule 73 (1) and (2) of the East African Court of Justice Rules of Procedure, 2013 - Act No. 1/31 of 31st December 2013, Burundi*

This application arose out of Reference No. 2 of 2014 wherein the Applicants challenged inter – alia the creation of a National Commission for Lands and other Assets in the Republic of Burundi vide Act No. 1/31 which came into effect on 31st December 2013. The Applicants contend that the Commission has powers similar to those of the Judiciary which was a breach of Articles 6(d) and 7 (2) of the Treaty.
The Applicants sought *inter alia* an 'interim Ex-Parte order' to stay the enforcement of the Act No. 1/31 of 31st December 2013 in the Republic of Burundi pending the hearing of the Reference.

The 1st Respondent submitted that the Commission was a result of the 2000 Arusha Peace and Reconciliation Agreement for Burundi and that that none of the provisions of the Treaty had been breached. The 2nd Respondent contended that the Application was not tenable within the Law of the East African Community.

**Held:** The National Commission for Lands and other Assets had been functioning for several years thus the wider interests of justice required that the situation should continue to obtain until the Court determined Reference No. 2 of 2014 on its merits. The Application was therefore dismissed.

**Case cited:**
Giella v Cassman Brown [1973] E.A. 358
Maguna Andu Self Selection Stores Ltd v Albert Ouma Akeyo [2014] eKlr

**Ruling**

**Introduction**

1. The Notice of Motion dated 28th February 2014 is premised on the provisions of Article 39 of the Treaty for the Establishment of the East African Community (hereinafter "the Treaty") and Rule 73 (1) and (2) of the East African Court of Justice Rules of Procedure ( hereinafter "the Rules") It arises out of Reference No. 2 of 2014 wherein the Applicants challenge inter – alia the creation of a National Commission for Lands and other Assets (hereinafter "the Commission") in the Republic of Burundi vide Act No. 1/31 which came into effect on 31st December 2013. One of the complaints made with regard thereto, is that the said Act in effect granted the Commission powers akin to those of the Judiciary which is a violation and a breach of Articles 6(d) and 7 (2) of the Treaty.
2. In the Notice of Motion aforesaid the Applicants now seek the following orders:
   "1. Pending the hearing and determination of the Reference, this Honourable Court be pleased to grant an interim Ex-Parte order to stay the enforcement of the Act No. 1/31 of 31st December 2013 in the Republic of Burundi.
   2. An Order that pending hearing and determination of the matter Inter-Partes, this Honourable Court be pleased to grant an Interim Ex-Parte order that the National Commission of Lands and other assets is no more competent to entertain and determine the matters related to lands and other assets.

   An Order that pending the hearing and determination of the matter Inter-Partes, this Honourable Court be pleased to grant an Interim Ex-Parte Order that from now up to the final judgment the Ordinary jurisdictions of the Republic of Burundi will be competent to entertain and determine all litigious matters related to lands and other assets.

   The costs of this Application be met by the Respondent.

   This Honourable Court be pleased to order such further or other orders as it deems fit and just in the circumstances."

**Case and Submission for the Applicants**

3. The Applicants filed Affidavits in support sworn on February 2014 by one, Prof. Charles Nditije, legal representative of UPRONA Party, as well as separate Affidavits by Gabriel Sinarinzi and Onesime Kabayabaya, the 2nd and 3rd Applicants, respectively, sworn on the same date. A further Affidavit was also sworn by Onesime Kabayabaya on 16th April 2014.
4. Mr. Vital Nshimirimana, learned Counsel for the Applicants, also made elaborate submissions on their behalf and in a nutshell the case for the Applicants is as set out herebelow.
5. Firstly, from the grounds on the face of the Notice of Motion under consideration and from a casual reading of Reference No. 2 of 2014, the main issue in contention is whether the creation of the Commission is an affront to the general principle of the need for an independent and impartial judiciary in every democracy. The argument made by the Applicants in that regard, is that the said principle was not upheld in the establishment of the Commission. The reasons made for that argument are that its decisions are final, are immediately enforceable notwithstanding any appeal and in any event that any such appeal is to a non-existent Special court.
6. Secondly, that the Commission is lacking in independence because its members are appointed by the President of the Republic of Burundi and act under his direct supervision and report directly to him on the sensitive issue of land.
7. Thirdly, the proceedings of the Commission do not respect the right to legal representation and that advocates are barred from appearing before it. The net effect of adoption of such a procedure is that the right to a fair trial is negated, so the Applicants argue.
8. Fourthly, that although the Commission is a purely administrative organ, its creation is a violation of the doctrine of separation of powers and has allowed the Executive to intrude into space reserved for the Judiciary and thereby unlawfully substitute itself for the judiciary. In addition, Mr. Nshimirimana stated, on this aspect of the case, that the establishment of the Commission has led to a duplication of regimes as some of the land disputes pending before courts of law are also presented for determination by the Commission, thus creating confusion as to which regime supersedes the other.
9. Fifthly, that the actions of the Government of the Republic of Burundi in setting up the Commission is a breach of the fundamental and operational principles of the Treaty including the Rule of Law, Good Governance and the principles of Human Rights and therefore pending the hearing and determination of Reference No. 2 of 2014, interim reliefs as set out above should be granted to forestall any further alleged suffering by real and potential victims of the Commission's decisions.
10. Lastly, in his Affidavit, Mr. Kabayabaya deponed that Prof. Nditije was entitled to swear the Affidavit in support of the Notice of Motion as he had been legally appointed by the Central Committee of UPRONA Party as the President and legal representative of the Party after the amendment of its Constitution on 8th August 2009. Further, that Mr. Nshimirimana had also been lawfully appointed to act for the Applicants in this Court.

**Case and Submissions for the 1st Respondent**

11. The 1st Respondent, the Attorney-General of Burundi opposes the Application and filed a Replying Affidavit sworn on 1st April 2014 by Sylvestre Nyanddwi, Permanent Secretary in the Ministry of Justice of the Republic of Burundi in that regard. Mr. Nestor Kayobera, Director, Judicial Organisation of the Office of Attorney-General of Burundi, argued its case which in a nutshell is that the Application is speculative and without merit because there are no facts upon which it is founded.
12. Regarding the specific claim that there is no mechanism for appeals from the decisions of the Commission, the 1st Respondent's answer is that whereas it is true that the Special Court to handle such appeals has not been created, all such appeals are presently being handled by competent courts and tribunals in Burundi and therefore there is no lacunae in the legal process at all.
13. The 1st Respondent has further denied the argument that advocates are not granted audience before the Commission and that there is no evidence that any litigant has been denied the right to fair representation in any such proceeding.
14. On the Applicants' submission that the Commission has invaded the space constitutionally reserved for the Judiciary, the 1st Respondent has argued that the doctrine of separation of power is alive and well in the Republic of Burundi and that its Constitution clearly demarcates powers as between the Executive and the Judiciary.
15. As to the background for the creation of the Commission, Mr. Nyandwi deponed that it was a result of the 2000 Arusha Peace and Reconciliation Agreement for Burundi and is a popular initiative supported by a majority of the people of Burundi and not one person has challenged its legality in any court in Burundi.
16. It is also the 1st Respondent's contention that none of the provisions of the Treaty have been breached or violated and the Applicants are malicious persons bent on reaping from lands unlawfully acquired since 1972 when Burundi descended into ethnic violence forcing many people to flee their lands. That therefore, this Court ought not to reward them by granting the orders sought and instead the Application should be dismissed with costs.
17. In his submissions, Mr. Kayobera made a lot out of the place of Prof. Nditije in UPRONA and argued that he had no mandate in law to represent that Party and that the Application is, for that reason alone, incompetent.

**Case and Submissions for the 2nd Respondent**

18. By Submissions filed on 5th May 2014, the 2nd Respondent, Secretary-General of the East African Community (EAC) opposes the Motion and states from the outset that although no orders are sought against him, the Application should still be dismissed as it is not tenable within the Law of the EAC. In any event, that he has already constituted a team to visit Burundi and verify the many claims regarding abuses in land ownership and generally the governance situation in Burundi. The team is yet to do so and therefore grant of interim orders before such a report is presented to him would not be a tenable proposition.
19. Dr. Anthony Kafumbe, Counsel for the 2nd Respondent further submitted that the orders sought are in the nature of injunctions and are therefore a matter of judicial

discretion. He relies on the decisions in *Sergent vs Patel [1972] 16 EALA 63 and Giella vs Cassman Brown [1973] E.A. 358* to argue that none of the orders sought should therefore be granted.

In the end, the 2nd Respondent seeks that the Application should be dismissed with costs.

**Determination**

20. The Notice of Motion before us is brought under the provisions of Article 39 of the Treaty and Rule 73 (1) and (2) of the Rules of Procedure of this Court which both grant the Court the jurisdiction to grant "any interim orders or issue any directions which it considers necessary or desirable" on such terms as it deems fit. This mean that the Court has the unfettered discretion to grant or refuse to grant such orders and as is the law, discretion must always be exercised judiciously. In saying so, we are in agreement with the decision of Koome, J. A. in *Maguna Andu Self Selection Stores Ltd vs Albert Ouma Akeyo [2014]* eKlr that:

"…judicial discretion is always done on a reasonable basis; it must be based on facts or laws that demonstrate that the applicant is deserving of the orders…"

21. We agree and with the above background in mind and looking at the Application before us and specifically the prayers sought, the language is less than elegant and created confusion at the hearing. We say so, with respect, because it seems that the Applicants are seeking "ex-parte" orders at the "inter-partes" stage and which by their tenure and effect, also seem to be "final" in nature. Interim orders under both Article 39 and Rule 73 (1) and (2) are precisely that; interim pending the final decision in a reference hence the words in Article 39 that "interim orders and other directions issued by the Court shall have the same effect as decisions of the Court." Decisions are, therefore, final but interim orders are not final although they are as binding as final decisions.
22. Further, as was clear from the submissions of Dr. Kafumbe for the 2nd Respondent, Parties were unclear as to what principles of law should be applicable to the Motion. Neither Counsel for the Applicants nor Counsel for the 1st Respondent addressed that issue but Dr. Kafumbe in his submissions approached all the prayers as if they were seeking an interlocutory injunction hence his reliance on the three principles in *Giella vs Cassman Brown (supra)* i.e
    (i) that an applicant must demonstrate a prima facie case with the probability of success.
    (ii) that damages may not be an adequate remedy if the injunction is not granted
    (iii) If the Court is in doubt, then it shall determine the application on a balance of convenience.
23. On our part it is clear to us that prayer (a) of the Application seeks orders of stay of the enforcement of Act No. 1/31 of 31st December 2013.

    Prayer (b) on the other hand, is worded in the nature of a declaratory order that the Commission is no longer competent to entertain and determine matters related to land and other assets. Prayer (c) seems to be seeking a mandatory injunction that pending the final judgment in Reference No. 2 of 2014, the ordinary jurisdictions (presumably the National Courts of Burundi) shall be compelled to entertain and

determine all litigious matters related to land and other assets.

24. Our rendion of the prayers above is borne by the Court record of 18th June 2014 when we sought clarification from Mr. Nshimirimana on the issue. If that be so, therein lies the first difficulty that the Applicants must contend with. We say so, because prayer (b) as framed and argued cannot be granted as an interim order. "Interim Order" is defined in *Black's Law Dictionary, 9th Edition* as:
"a temporary court decree that remains in effect for a specified time until a specified event."
25. When, therefore, the Applicants pray that an "interim ex-parte order that the National Commission for Lands and other assets is no longer competent to entertain and determine the matters related to lands and other assets",should be granted at the interlocutory stage of the proceedings, even with the misplaced words, "interim ex-parte order" in that prayer, the final effect of any issuance of the order would be a final declaration on the issue which would not be proper in the circumstance of this case. We say so because we are yet to hear the merits of the case as set out in Reference No. 2 of 2014 and to issue prayer (b) at this stage, would be equal to pre-judging it without hearing the other Parties to the said Reference.
26. Turning back to prayer (a) of the Application, it is not in doubt that Act No. 1/31 of 31st December 2013 has already come into operation and the Commission has been set up and is functional. The 1st Respondent by the Affidavit of Mr. Nyanddwi has stated that Act No. 1/31 is actually an amendment of Act No. 1/01 enacted on 4th January 2011 and which itself had amended Act No. 1/17 enacted on 4th December 2009 which provides for the mandate, composition, organization and functions of the Commission. The latter averment has not been denied, neither has the submission by Dr. Kafumbe that the process of the Commission should not be interrupted so as to avert chaos, been contested. In other words, the Commission seems to have been in place from 2009 or thereabouts and certainly it is in place and working.
27. On our part and in the totality of things, at this stage, we cannot delve into the propriety or legality of Act No 1/31, but suffice it to say that the Commission now in question is a creature of the Legislature of Burundi within its constitutional mandate. We do not at all have such persuasive material placed before us to warrant the drastic action of suspending the law without hearing all parties on the merits. There is also the question of jurisdiction raised by both Respondents and to swing the sword of justice one way at the interlocutory stage would be unjust and this Court declines the invitation to do so.
28. Regarding prayer ( c) of the Application, we understood the Applicants to be saying that in fact some land disputes are being handled by both the National Courts of Burundi and the National Commission on Land and Other Assets. But prayer (c) is specific; that pending the judgment in Reference No. 2 of 2014, "all litigious matters related to lands and other assets" should be entertained and be determined by the ordinary courts of Burundi.
Upon considering the prayer above, we find tremendous difficulty in granting it at this stage. We say so, with respect, because the Commission is still a statutory institution under the laws of Burundi, despite displeasure expressed by the Applicants. One of the prayers in Reference No. 2 of 2014, is that Act No. 1/31 should be annulled and

that therefore means that all land disputes would thereafter be handled by National Courts in Burundi. Suppose we grant prayer (c) now and in the Reference we decline to annul Act No. 1/31. What would be the effect of our decision? Obviously, the Court, as the 1st Respondent has argued, would have perpetuated a chaotic procedural and legal situation, a position we refuse to put ourselves in. As we have stated above, the Commission is functioning and has been for some years. It is best therefore that the situation as obtaining today should continue to obtain and the Court will render itself fully and finally on both Act No. 1/31 and its processes including the work of the Commission, once Reference No. 2 of 2014 is heard and determined on its merits. That, in our view, is the best course of action in the wider interests of justice.

29. Having disposed of the main issues in the Application, we do not see any reason to delve into the issue whether Prof. Ndetije is the legal representative of UPRONA Party and whether Mr. Nshimirimana was properly appointed to act in these proceedings.

**Conclusion**

30. Land is an emotive issue in the East African region and Courts generally bear that fact in mind when settling disputes tied to land, but as regards the Application before us, we have said why we see no merit in it and we shall dismiss it as prayed by the Respondents.
31. Regarding the costs, let the same abide the outcome of Reference No. 2 of 2014.
Orders accordingly.

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East African Court of Justice – First Instance Division
Application No. 5 of 2014

Arising from Reference No. 3 of 2014

&

Application No. 10 of 2014

Arising from Reference No. 5 of 2014

**Mbidde Foundation Ltd and Rt. Hon. Margaret Zziwa And Secretary General of East African Community and the Attorney General of Republic of Uganda**

Before: Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, Monica K. Mugenyi, J
May 29, 2014

*Interim orders on the removal of the Speaker of EALA - Reputational injury - Separation of powers between organs of the Community.*

*Articles: 30(1), 49(2)(g), 53, 60 of the Treaty Establishing the East African Community- Rules: 9(4), 83, 88 of the East African Legislative Assembly Rules of Procedure – EALA Committee on Legal, Rules and Privileges.*

The first Applicants filed Reference No. 3 of 2014 and Reference No. 5 of 2014 respectively, alleging that the procedure for removal of a Speaker as enshrined in Uganda Assembly's Rules of Procedure infringed the East African Community Treaty. Both sought interim orders restraining the East African Legislative Assembly from investigating or removing the Hon. Speaker from office,

**Held:**

1) The first Applicant did not demonstrate any injury it was likely to suffer if the injunction was not granted. The material availed to the Court on the perceived bias of the Assembly's Committee on Legal, Rules and Privileges did not prima facie demonstrate an act of Treaty infringement such as would invoke the provisions of Article 30(1) of the Treaty.
2) Thus the incidence of bias had not crystallized so as to give rise to a cause of action under Article 30.
3) Whereas in certain circumstances reputational injury is difficult to meaningfully compensate by damages, such injury is relatively easier to assess and quantify with regard to an individual such as the second Applicant than would be the case in assessing the cost thereof to the future prospects of relatively young but pivotal regional institutions such as the EAC and EALA.
4) Whereas the office of the Speaker is vital to the operations of the EALA and the removal of the holder thereof should never be approached casually or flippantly,

in our judgment the first Respondent in his representative capacity as enshrined in Article 4(3) of the Treaty stands to suffer inconvenience with more far reaching repercussions to the entire Community should a temporary injunction be granted, than the second Applicant would suffer should we refuse the injunction. The consolidated application was dismissed.

**Cases cited:**
American Cyanamid v Ethicon Ltd (1975) AC 396
E. A. Industries v. Trufoods [1972] EA 420
Giella vs. Cassman Brown (1973) EA 358 (CA)
Hubbard v Vosper (1972) 2 QB 84

Ruling

1. On 27th March 2014, a Notice of Motion for the removal of the Hon. Speaker of the East African Legislative Assembly (EALA) was tabled before the Assembly. When the Petition was presented, the Hon. Speaker (Second Applicant herein) adjourned the Assembly *sine die* before the said Petition had been referred to the Committee on Legal, Rules and Privileges for investigation as provided by the Assembly's Rules of Procedure. She thereafter filed Reference No. 5 of 2014 in this Court alleging that the procedure for removal of a Speaker infringed the EAC Treaty provisions. Shortly before this, the first Applicant had filed Reference No. 3 of 2014 in this Court similarly alleging that the procedure for removal of a Speaker as enshrined in the Assembly's Rules of Procedure infringed the East African Community (EAC) Treaty's provisions. Both Applicants filed separate applications for Interim orders restraining the EALA from investigating or removing the Hon. Speaker from office, or moving any Motion the purpose of which would be to cause such investigation or removal, pending the determination by this Court of the above References. The applications in issue are *Application No. 5 of 2014 – Mbidde Foundation Ltd vs. The Secretary General of the East African Community & the Attorney General of the Republic of Uganda, on the one hand; and Application No. 10 of 2014 – Rt. Hon. Margaret Zziwa vs. The Secretary General of the East African Community on the other hand*.
2. In a nutshell, Application No. 5 of 2014 is premised on the following grounds:
   a. The EALA Rules of Procedure, including the Rules for the removal of the Speaker, have never been formally adopted as provided by Rule 88 thereof and Article 49(2)(g) of the Treaty, therefore, there is no provision for such action by EALA.
   b. The Respondents have to date not responded to a Petition by the Applicant for them to seek an advisory opinion from this Court over the interpretation of the EAC Treaty and EALA Rules of Procedure in so far as they pertain to the removal of the Speaker.
   c. The Applicant is a legal person resident in Uganda, a Partner State in the EAC; has an interest in the efficient functioning of the EALA and the larger East African

Community, and is concerned that the removal of the Speaker with no provision for a Deputy Speaker will bring the legislative function of the EAC to a halt and cause grave economic, political, social and legal ramifications, including creating confusion as to the replacement of the Speaker in the absence of any provision therefor in the Rules.

d. Rule 9 of the EALA Rules of Procedure contravenes Articles 6(d), 7(2), and 53(3) of the EAC Treaty, as well as the principles of natural justice in so far as it limits the time available to the Speaker to be heard in her defense and does not substantiate the grounds for the removal of the Speaker outlined in the Treaty.

e. There is a pending Reference to this Court that has a high probability of success given that the purported impeachment of the Speaker would contravene the provisions of the EAC Treaty.

f. The Speaker would suffer irreparable damage if the EALA is permitted to proceed with the impeachment process as her right to a fair hearing would be compromised and the pending Reference would be rendered nugatory.

3. On the other hand, Application No. 10 of 2014 is premised on the following grounds:
   a. The existence of Reference No. 5 of 2014 pending before this Court.
   b. The said Reference raises triable issues and establishes a prima facie case.
   c. No reference has been made to the Assembly's Committee on Legal, Rules and Privileges for investigation; therefore, the application is made to preserve the status quo.
   d. Unless the orders prayed for are granted, the second Applicant stands to suffer irreparable damage and harm.

4. All Parties conceded to the consolidation of the two References and the applications arising therefrom, so they were duly consolidated. At the hearing of the consolidated application, this Court was extensively referred to the decision in *Giella vs. Cassman Brown (1973) EA 358 (CA)* as applied in *Prof. Peter Anyang' Nyongo & 10 others vs. The Attorney General of the Republic of Kenya & 3 others, EACJ Ref. No. 1 of 2006* in support of the preposition that an Applicant who seeks a temporary injunction must show; first, a prima facie case with a probability of success; secondly, that non-grant of the temporary injunction would expose such an Applicant to irreparable injury that would not be justly compensated by an award of damages, and, thirdly, that where a court is in doubt, it would decide the application on a balance of convenience. For ease of reference, we reproduce the decision in *Giella (supra)* below (per Spry, VP):
   "The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E. A. Industries vs. Trufoods [1972] EA 420*)."

5. As depicted above, in deciding as he did in *Giella (supra)*, Spry VP relied upon his earlier decision in *E. A. Industries vs. Trufoods [1972] EA 420*. We reproduce the relevant part of the judgment in the latter case for clarity:
   "There is, I think, no difference of opinion as to the law regarding interlocutory

injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages."

6. Applying the foregoing principles to the application before him, the learned judge then held (p.422, 423):
"I think that a prima facie case has been shown but I am not prepared to say that the outcome is so certain one way or the other that the application ought not to be decided on the balance of convenience."
7. The distinguished judge then considered the balance of convenience thus:
"I think the harm the respondent company would suffer as the result of an injunction, if it succeeded in the suit, is likely to be greater and graver than that which the appellant company would suffer from the refusal of an injunction, should it be successful. Moreover, and I attach particular significance to this, I cannot see that the appellant company would suffer any loss that could not be sufficiently compensated by an award of damages, and it has not been suggested that the respondent company would not be able to meet any award that might be made. For these reasons, I think the judge was right to refuse an injunction."
8. It seems to us that in *E. A. Industries vs. Trufoods (supra)* the learned judge identified only one condition for the grant of injunctions, that is, the existence of a prima facie case with probability of success. In that case, although a prima facie case was ruled to have been shown, the court was unable to determine the case's prospects for success one way or another. The court therefore determined the application on balance of convenience, but in so doing gave due consideration to whether or not the loss suffered by the applicant could be adequately compensated by damages. On the contrary, however, in the latter case of *Giella (supra)* the same court (East African Court of Appeal) applied the principles in *E. A. Industries vs. Trufoods (supra)* in such a manner as has been deduced to mean that recourse may only be sequentially made to the balance of convenience of a matter where a court was in doubt as to the incidence of a prima facie case with a probability of success and proof of injury that cannot be compensated by damages.
9. We agree with the above holdings but do also find most persuasive exposition on the principles governing the grant or refusal of temporary injunctions, as well as the rationale for such injunctions in English authorities. They do also provide a pertinent historical perspective.
10. In the case of *Hubbard vs. Vosper (1972) 2 QB 84* the Court of Appeal of England deprecated any attempt to fetter courts' discretion by laying down rules that would have the effect of curtailing the flexibility inherent in the objective of interlocutory injunctions. However, in that case the court left intact the 'rule' that when considering an application for interlocutory injunction, a court had to be satisfied that a prima facie case had been established.
11. In *American Cyanamid vs. Ethicon Ltd (1975) AC 396* that rule too was undone by the House of Lords in the following terms (per Lord Diplock):
"Your Lordships should, in my view, take this opportunity of declaring that there is

no such rule. The use of such expressions as '*a probability*', '*a prima facie case*', or '*a strong prima facie case*' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

(However) It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial."

12. The House of Lords thus reversed the requirement for a prima facie case as a condition for grant of an injunction in preference for demonstration by the applicant of a serious question to be tried. In the same case, the court articulated the objective of interlocutory injunctions viz the other two 'conditions' demarcated in *Giella (supra),* that is, irreparable injury that cannot be adequately compensated by damages and balance of convenience, as follows:
13. "The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."
14. It does appear, then, that the 'compensatability' of either party by damages is simply one of the considerations to be weighed by the court in determining where the balance of convenience lies, and not necessarily a condition for the grant or refusal of an injunction. The conditions for grant of a temporary injunction would appear to be most persuasively summed up in *Halsbury's Laws of England, Vol. 11 (2009), 5th Edition*, para. 385 as follows:

    "On an application for an interlocutory injunction the court must be satisfied that there is a serious question to be tried. The material available to court at the hearing of the application must disclose that the claimant has real prospects for succeeding in his claim for a permanent injunction at the trial. The former requirement that the claimant should establish a strong prima facie case for a permanent injunction before the court would grant an interim injunction has been removed."
15. In the instant application, the first Applicant faulted both Respondents for ignoring its petition to them to seek an advisory opinion of this Court as to the applicability of the EALA's Rules of Procedure for purposes of the removal of the Speaker. It was the said Applicant's contention that the inaction by the Respondents contravened Article 36(1) of the EAC Treaty.
16. The first Applicant also took issue with the legality of the said Rules of Procedure and invited this Court to declare them void *ab initio* for having never been formalized into law as provided under Rule 88 thereof or, in the alternative, declare Rule 9 of the

Rules null and void to the extent of its contravention of Articles 6(d), 7(2) and 53(3) of the EAC treaty.

17. The second Applicant identified herself with the latter contention that the procedure for the Speaker's removal outlined in Rule 9 of the EALA's Rules of Procedure infringed Treaty provisions in so far as it contravened the doctrine of natural justice. The first Applicant's grievance with the Rules is premised on the alleged haste inherent in the hearing accorded to the Hon. Speaker in her defense, while the second Applicant's grievance is rooted in the perceived bias that would accrue to an investigation by the Assembly's Committee on Legal, Rules and Privileges as presently constituted.
18. At face value, without recourse to the merits of the consolidated References, we find that the first Applicant's interpretation of Article 36 of the Treaty may not represent the spirit and letter of the Treaty. A plain reading of the said Article reveals that the entities that are mandated to seek an advisory opinion from the court are not obliged to do so whether of their own volition or when so requested by a purportedly interested party. Therefore, subject to more intrinsic arguments at the hearing of the consolidated Reference, the grounds of this application that are premised on such interpretation would appear not to raise serious triable issues.
19. Similarly, and perhaps more importantly, we are unable to accept the first Applicant's interpretation of Rule 88 of the Assembly's Rules of Procedure. We agree with Mr. Wilbert Kaahwa, learned counsel for the first Respondent, that such interpretation goes to the root of EALA's existence and, indeed, any issues for determination herein that emanate from the Assembly's Rules of Procedure. Rule 88(1) states that 'the' first sitting of the Assembly elected under the Treaty shall be for purposes of adopting the Assembly's Rules of Procedure. It was argued by Mr. Mukasa Mbidde that each 'Assembly' was required to adopt the said Rules of Procedure as the definition of 'Assembly' in the said Rules pertained to each Assembly of the House, the present one being the 3rd Assembly. With respect, we are unable to agree with this interpretation. It seems quite clear to us that use of the word '*the*' rather than 'every' first meeting of the Assembly refers to the very first meeting following the inception of the EALA. Further, Rule 88(1) makes reference to the first meeting of 'the' Assembly defined in Rule 1 as the East African Legislative Assembly; it does not refer to the first meeting of 'an' Assembly, as appears to be learned counsel's argument. Therefore, that ground does not demonstrate a serious triable issue either.
20. Furthermore, at this stage without the benefit of more detailed evidence and arguments by either party, we are unable to fathom how the submission of the Motion for the Speaker's removal to EALA's Committee on Legal, Rules and Privileges would contravene principles of good governance. It seems to us that subjecting such an action to due process as outlined in Rule 9 would, in principle, promote rather than violate the principle of rule of law outlined in Articles 6(d) and 7(2) of the EAC Treaty.
21. Be that as it may, we take the view that the Applicants' allegation of bias by the Committee on Legal, Rules and Privileges is neither idle, nor frivolous or vexatious. The material available to this Court in the second Applicant's Affidavit does seem to underscore this position - (See annexures A, D, and E thereof). The question, however, is whether the issue of bias is properly before this Court at this stage,

pending the proceedings before the EALA.

22. It was argued by Mr. Kaahwa that the consolidated Application did not disclose a cause of action either under Article 30 or 39 of the Treaty. Learned Counsel entreated this Court to give due consideration to the doctrine of separation of powers viz the Assembly's designated functions, and wondered what action was under scrutiny for purposes of Article 30 of the Treaty given that EALA was yet to debate the Motion for the removal of the Speaker. In reply, Mr. Justin Semuyaba for the first Applicant contended that the action that gave rise to a cause of action under Article 30 of the Treaty was the EALA's action of presenting the Petition for the Hon. Speaker's removal before the House. Mr. Semuyaba further faulted the procedure outlined in Rule 9 of the Assembly's Rules of Procedure for being too hasty, violating the doctrine of natural justice and thus infringing Article 6(d) of the Treaty. According to him, any infringement of the Treaty would give rise to a cause of action thereunder.
23. First and foremost, we are unable to agree with the Applicants that the presentation of the Petition to the Assembly, in itself, constituted an infringement of the Treaty. This procedure is prescribed under Rule 9(4) of the Assembly's Rules of Procedure. As explicitly stated in the long title thereto, those Rules of Procedure were promulgated under Articles 49(2) and 60 of the Treaty. No material was availed to this Court as would suggest that the Rules per se infringe Treaty provisions. We understood both Applicants' case to be that the implementation of the said Rules would violate the doctrine of natural justice and, therefore, Article 6(d) of the Treaty, hence this consolidated Application to restrain further implementation thereof beyond the presentation of the petition to the House. Subject to more detailed scrutiny of this contention during the hearing of the consolidated Reference, at this stage we find that the presentation of the Petition to the House was in compliance with Rules duly promulgated under the EAC Treaty and, therefore, in compliance with the said Treaty.
24. Secondly, the removal of the Speaker of the Assembly is a function of the EALA as provided by Article 53 of the Treaty. The procedure for such removal is detailed in Rule 9 of the Assembly's Rules of Procedure. Article 49(2)(g) of the Treaty does indeed mandate the Assembly to formulate its own rules of procedure, as well as those that pertain to its committees. The Committee on Legal, Rules and Privileges is one such committee. In the instant case, where both Applicants fault the Assembly's Rules of Procedure, Rule 83 of the said Rules does make provision for the amendment thereof by the EALA. Although both Applicants are members of the said Assembly, there is no indication before us that recourse has been made to such course of action.
25. Similarly, on the question of bias there is no material before us that indicates that the issue has been duly raised before the Assembly and the said body has declined or omitted to address it by recusal from the Committee of Legal, Rules and Privileges of the members perceived to be biased; amendment of the Rules of Procedure to address the perceived bias or, by the Assembly otherwise effecting necessary measures to address the said complaint. In the premises, we find that the incidence of bias has not crystallized so as to give rise to a cause of action under Article 30(1) of the Treaty or invoke the jurisdiction of this Court under the same provision. We do agree with Mr. Kaahwa that provision for the respective mandates of each Organ of the Community is reflective of the renowned doctrine of separation of powers that this

Court is enjoined to observe and uphold.

26. Accordingly, whereas the material available to this Court with regard to the perceived bias of the Assembly's Committee on Legal, Rules and Privileges is neither frivolous nor vexatious; at this stage, without prejudice to the merits of the consolidated Reference, we find that the said material does not *prima facie* demonstrate an act of Treaty infringement such as would invoke the provisions of Article 30(1) of the Treaty. Having so found, we do not deem it necessary to consider the balance of convenience in this matter.
27. Be that as it may, had we considered the balance of convenience in this matter an important consideration in this balancing exercise would be whether any potential injustice to either party could be adequately compensated for by damages. If the injury likely to be suffered by either party could be quantified financially we would be inclined to grant or refuse the injunction accordingly. For instance, if the injury to the second Applicant may be adequately compensated by damages, this Court would be inclined not to grant the injunction; and similarly if the injury likely to be suffered by the Respondents may be compensated in damages, this Court would be inclined to grant the injunction. The Applicants bore the burden of demonstrating that grant of the injunction was necessary to protect them against irreparable injury. With respect, we are not satisfied that the first Applicant demonstrated any injury it is likely to suffer. The affidavit of one Moses Kyeyune Mukasa is to the effect that the first Applicant seeks to protect Uganda's rotational interest in the office of the Speaker, as well as the rights of the incumbent Speaker herself, but it does not provide material that demonstrates the injury that party is likely to suffer if the injunction is refused.
28. With regard to the second Applicant, we are mindful of the possible damage to her reputation should the injunction not be granted and she emerges successful in the Reference after her removal from the office of Speaker. This was ably articulated by Mr. John Tumwebaze, although it might have been neater if it had been addressed in pleadings rather than raised in arguments from the Bar. The material availed to us in this application lends credence to the possible reputational damage to the second Applicant, as well as the EAC as an institution. However, whereas we recognize that in certain circumstances reputational injury is difficult to meaningfully compensate by damages; in our considered view such injury is relatively easier to assess and quantify with regard to an individual such as the second Applicant than would be the case in assessing the cost thereof to the future prospects of relatively young but pivotal regional institutions such as the EAC and EALA.
29. Further, weighing the likely inconvenience or damage that would be suffered by the Applicants if the injunction is not granted against the likely inconvenience or cost to the Respondents if it is granted; we take the view that whereas the office of the Speaker is vital to the operations of the EALA and the removal of the holder thereof should never be approached casually or flippantly, in our judgment the first Respondent in his representative capacity as enshrined in Article 4(3) of the Treaty stands to suffer inconvenience with more far reaching repercussions to the entire Community should we grant a temporary injunction, than the second Applicant would suffer should we refuse the injunction.

30. In the result, with the greatest respect, we decline to grant the interim orders sought and do hereby dismiss this consolidated Application.
31. The costs thereof shall abide the outcome of the consolidated Reference.
32. We direct that it be fixed for hearing as a matter of priority.

It is so ordered.

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East African Court of Justice – First Instance Division
Applications Nos. 8 and 9 of 2014

Arising from Reference No. 5 of 2013

**M/S Quality Chemical Industries Ltd and M/S National Medical Stores And Godfrey Magezi**

Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, John Mkwawa, J, J, Faustin Ntezilyayo, J, Monica Mugenyi, J
June 19, 2014

*Costs- Interested party - Misjoinder of parties- Withdrawal of Reference.*

*Rules 21 (1), (5), 51 (2), of the East African Court of Justice Rules of Procedure, 2013*

On July 25, 2013 the Respondent filed Reference No. 5 of 2013 and named the First and Second Applicants as the Fifth and Fourth Interested Parties, respectively. The First Applicant filed its Reply on September 20, 2013 and on 25th November 2013, the Respondent filed an Amended Statement of Reference which purported to withdraw the Reference as against all the Interested Parties. On December 11, 2013, the Respondent then wrote a letter to all Interested Parties informing them that he had withdrawn the Reference against them. Both Applicants demanded for payment of legal costs incurred in defending the Reference and when this was not forthcoming, they filed these Applications. They also contended that the Rules of the Court did not provide for interested parties.

The Respondent conceded that the Applicants were misjoined in the Reference and he wrote to them accordingly. However he alleged that the responses filed by the Applicants were not a chargeable item under the Third Schedule of the Court's Rules of Procedure, the Applicants were not entitled to the costs sought.

**Held:** Costs are payable when there is a withdrawal of or discontinuance of a Reference or for wrongly impleading a party, unless parties to the Reference on their own volition do otherwise agree to a withdrawal under Rule 51 (2). The Applicants were therefore granted the costs as prayed.

**Cases cited:**
Amrit Goyal v. Harichund Gayal & 3 Others, Court of Appeal of Uganda at Kampala, Civil Application No. 109 of 2004
McPherson v. BNB Paribas [2004] 3 AII E. R. 226
PCCW Global (HK) Ltd v Gemtel Ltd, High Court of Uganda, Misc.Civil Application No.0247 of 2011

**Ruling**

1. The Applications herein, namely, Application No. 8 of 2014 dated March 31, 2014 and filed in Court on April 1, 2014; and Application No. 9 of 2014 dated April 3, 2014 and filed in Court on April 4, 2014 arise from Reference No. 5 of 2013 which is dated July 24, 2013 and filed in Court on July 25, 2013. Those Applications are brought under Rules 21 (1) and (5) and 51 (2) of the Rules of this Court and were consolidated and heard together on 2nd June 2014.
2. It is common ground that in Application No. 8 of 2014, the Applicant (then named as the Fifth Interested Party), is M/s Quality Chemical Industries Ltd. It is also common ground that in Application No. 9 of 2014 the Applicant (then named as the Fourth Interested Party) is M/s National Medical Stores Ltd.
3. It is on record that on September 20, 2013, Quality Chemical Industries (hereinafter to be referred as "the First Applicant") engaged the services of M/s Semuyaba, Iga & Co. Advocates of P. O. Box 12387 Kampala, Uganda whereas, National Medical Stores (hereinafter to be referred as "the Second Applicant") engaged the services of M/s Kiwanuka & Karugire Advocates; Plot 5A Acacia Avenue, Kololo – P. O. Box 6061, Kampala, Uganda to represent them in Reference No. 5 of 2013.
4. The Attorney General of Uganda (then and now the Respondent) appeared on behalf of other Interested Parties including the Inspector-General of Government (then named as the First Interested Party).His address for purposes of this matter is Plot No. 1, Parliament Avenue, Kampala, Uganda.
5. The Respondent in the instant matter is Godfrey Magezi (the Applicant in the aforesaid Reference) who engaged the services of M/s Nyanzi, Kiboneka & Mbabazi Advocates, Plot No. 103 Buganda Road, P. O. Box 7699, Kampala, Uganda.
6. In the proceedings before us, the Parties were represented as follows:
   i) Mr. Peter Kauma, holding brief for Mr. Justin Semuyaba for the First Applicant;
   ii) Messrs Peter Kauma and Kiryowa Kiwanuka appeared for the Second Applicant;
   iii) Mr. George Karemera advocated for the Attorney General of the Republic of Uganda hence also the Inspector-General of Government and;
   iv) Mr. Mohammed Mbabazi and Ms. Amnest Nayasheki appeared for the Respondent.
7. The facts leading to the instant Application are generally not in dispute. On July 25, 2013 the instant Respondent filed Reference No. 5 of 2013 and named the Inspector-General of Government as the First Interested Party (hereinafter referred to as "the IGG"). The First and Second Applicants in this matter were named as the Fifth and Fourth Interested Parties, respectively.
8. On August 15, 2013, the Registrar of this Court served the IGG with a notification of summons requiring him to file a response or written statement in regard to the Reference aforesaid. The First and Second Applicants were on August 13 and 14,2013, respectively served with the notification of summons requiring them to file a response/reply to the aforesaid Reference. Consequently, the First Applicant filed its Response/Reply on September 20, 2013. The IGG filed his Response/Replies upon the Respondent on September 27, 2013.
9. Thereafter, on November 25, 2013, the Respondent filed an Amended Statement of

Reference which also purported to withdraw the Reference as against all the Interested Parties.

10. On December 11, 2013, the Respondent then wrote a letter to all Interested Parties informing them that he had withdrawn the Reference against them. For ease of reference we have found it necessary to reproduce in full the contents of the aforesaid letter. It reads as follows:

> "Dear Sir/Madam,
>
> Re: Amendment of EACJ Reference No. 05 of 2013 and Discontinuance of the Reference Against Interested Parties
>
> This is to give you notice that the above Reference was amended and the Reference against yourselves/Clients as Interested Parties was withdrawn and/or discontinued. A copy of the amended Reference (without annexures) is attached. As you are aware, there is no such Party called Interested Party. We regret any inconvenience caused.
>
> Yours faithfully,
>
> Nyanzi, Kiboneka & Mbabazi
> Advocates"

11. Upon receipt of the aforementioned letter, both Applicants immediately reacted and on December 14, 2013, the First Applicant's counsel wrote to the Registrar of this Court and copied his letter to the Respondent, complaining about the manner in which the Reference was withdrawn against his client. The gravamen of his complaint was that the terms of the withdrawal or discontinuance were not agreed upon and that there was no provision made in the said letter for payment of costs.
12. Counsel for the Second Applicant, not unlike the First Applicant's Counsel, on December 16, 2013 wrote to the Respondent's Counsel whereupon he also demanded for payment of legal costs, incurred in defending the Reference.
13. For unknown reasons, Counsel for the Respondent did not find it necessary to respond to both Applicants, and the duo found it compelling to seek redress from this Court as is evident from the grounds of their Applications as set out in their supporting affidavits. The Affidavits in question are those of one Terry Nantongo for the First Applicant, sworn on March 31, 2013 and her Supplementary affidavit dated May 20, 2014.
14. The Second Applicant on his part relies on the affidavit of one Apollo Newton Mwesigye sworn on April 3, 2014.
15. In rebuttal the Respondent, through his Counsel denied any liability for costs and in support of his denial relied on his own affidavit sworn on May 14, 2014.
16. On June 2, 2014 when the matter was before us, all Parties conceded to the consolidation of the two Applications, and so they were duly consolidated. At the hearing of the consolidated application, Counsel for the Applicants, in a nutshell,

submitted to the following effect:

i. That their application was premised on Rules 51(2), 21 (1) and (5) of the Rules of this Court. It was their argument that the Respondent had impleaded them as interested parties and that the withdrawal/discontinuance of the matter against them was made on December 11, 2013 which is well over five (5) months since they were joined as Parties in the aforementioned Reference;

ii. It was their further argument that by the time the Respondent decided to withdraw/discontinue the matter against them, they had already filed their respective responses and it was also their contention that they were compelled to do legal research as the matter was not by any stretch of imagination of a simple nature. They further contended that they therefore made extensive research in preparation for the hearing of the Reference and in the process incurred expenses. It is on the basis of the foregoing and having regard to other costs that they had incurred in the process, that they are now before this Court pursuing their allegedly entitled costs;

iii. It was the Applicants' further contention, that they are in full agreement with the Respondent, as is evident in paragraphs 4, 5, 6 and 7 of Godfrey Magezi's affidavit in reply, that there is no provision for Interested Parties under the Rules of this Court. It was, however, the argument of both learned Counsel for the Applicants that as the Applicants were served with notification to respond within forty five (45) days, and that being an order of the Court they could not, as suggested by the Respondent in his affidavit aforesaid (paragraphs 7 and 8), simply ignore the Court's notification;

iv. It was also the Applicants' case that the Respondent impleaded them when he was fully aware that the Rules of this Court do not provide for interested parties and that the Respondent's Counsel cannot avail himself of the defence of an honest mistake or inadvertence on his part;

v. Counsel for the Applicants also urged that given the factual background of the matter now in Court and being guided by previous decisions in East Africa on similar matters, they could not simply ignore a court order or simply sit idly by, while there was a Court notification of summons requiring them to file their response(s). Learned Counsel further contended that those who choose to ignore court orders do so at their own peril;

vi. They further argued that absence of rules of the Court setting the procedure to be followed when a party is wrongly sued does not also warrant a litigant to idle away;

vii. In support of what they did in the matter now in question, they referred us to a decision of the High Court of Uganda viz. *PCCW Global (HK) Ltd vs Gemtel Ltd,Misc. Civil Application No.0247 of 2011* where the Court held that where a suit is withdrawn and the parties have filed no consent on costs, then the Court has to determine as a matter of discretion whether costs are payable by the party withdrawing the suit;

viii. Counsel for the Applicants concluded by submitting that although they were improperly brought before this Court and yet by appearing they have incurred costs, then they were entitled to costs as provided under Rule 111 (i) of the Rules

of this Court, which unequivocably states that costs follow the event, unless the Court for good reasons orders otherwise;

17. Mr. George Karemera, Senior State Attorney, representing the IGG associated himself with the submissions of Messrs Peter Kauma and Kiryowa Kiwanuka ,learned Counsel for the Applicants and further urged the Court to uphold Rule 111 (1) of this Court's Rules and grant the IGG costs incurred consequent to being improperly brought to Court;
18. The Respondent through the submissions of Mr. Mohammed Mbabazi, learned Counsel appearing for him, made a spirited defence against the Application. The reasons for his opposition are clearly spelt out in the affidavit in reply sworn by the Respondent on May 14, 2014.
19. It was the Respondent's further case that:-
    (a) There was no provision in the Rules of this Court for a party to a Reference filed in this Court to be referred to as an Interested Party;
    (b) The Applicants ought to have applied as interveners or amicus curiae rather than file responses as they did;
    (c) That the responses filed by the Applicants were not a chargeable item under the Third Schedule of this Court's Rules. Hence, the Respondent is not entitled to the costs sought;
    (d) That the Application under Rule 51 (b) is incompetent and procedurally irregular.
20. It was also the Respondent's case that the notification of summons that the Applicants had received was from the Registry and not the Respondent and so the Respondent cannot be penalized for an act that was committed by the Court.
21. For the above reasons, the Respondent urged the Court to dismiss the consolidated Applications.
22. On our part, we have taken a close look at the proceedings before this Court, commencing on July 25, 2013 when the instant Respondent filed Reference No. 5 of 2014 and named the Applicants in this matter and the IGG as Interested Parties. We have then, travelled the whole way up to June 2, 2014 when the learned Counsel for the Parties appeared before us, and made their oral submissions in support of their respective stances on the matter.
23. The matter is now before us for a formal determination as to whether or not the instant Applicants and the IGG (previously named as Interested Parties) are entitled to costs as prayed.
24. It is common ground between the Parties that the Respondent had on July 25, 2013 brought to Court the instant Applicants and the IGG in Reference No. 5 of 2014 and that on November 25, 2013 he withdrew the Reference against them. This is when he filed in this Court an amended statement of the Reference. It is also on record, as amply shown earlier in this Ruling, that the Respondent went another step further, namely, on December 11, 2013 he wrote a letter to all the then Interested Parties informing them that he had withdrawn the Reference against them.
25. It is plainly clear from the Respondent's answer to the Application that he is not denying the fact that the Applicants and the IGG were misjoined in the Reference.
26. The Parties in this matter are also in full agreement that neither the Rules of our Court nor the Treaty provide for what is called Interested Parties.

27. It can also be gathered from the submissions of Counsel for the Parties that the so-called Interested Parties were therefore not properly brought before this Court as they were sued in a capacity unknown to the law of the East African Community.
28. The Respondent on his part has not at all denied that the Applicants and the IGG had received a notification signed by the Registrar of this Court requiring them to file their responses; and that they filed their respective responses and that in doing so they incurred costs.
29. The only question that is now left for consideration and determination is whether or not the Respondent should be condemned to pay the costs incurred by the Parties in the Reference which has been withdrawn against them. This is where, as we can see, the Parties are at issue.
30. Mr. Mbabazi, for the Respondent, unlike his learned colleagues, neither referred us to any authority in support of his stance nor did he give us substantial reasons why this Court should not reimburse the Applicants for their labour and other incidental costs incurred in obeying the notification orders.
31. This Court, like the Court in *PCCW Global (supra)* and in the case of the Court of Appeal of Uganda at Kampala Civil Application No. 109 of 2004 - *Amrit Goyal v. Harichund Gayal & 3 Others*, is firmly of the
following view:-
    (a) The discretion to award or not to award costs is a judicial function;
    (b) That a court order including a notification of summons is not a mere technical rule of procedure that can be simply ignored. Court orders must be respected and complied with. Those who choose to ignore them do so at their own peril;
    (c) Any Court, worthy of its name, cannot condone deliberate acts of litigants who with impunity drag others to court by any names. Those who choose to do so, do so at their own peril;
    (d) All canons of fairness dictate that costs in any case, follow the event. The only time the court will deny a successful party costs is when there has been conduct on the part of the successful party which would call a court to exercise its discretion against the successful party.
32. It is on the basis of the foregoing that we are, respectfully, not in agreement with Mr. Mbabazi that the Applicants are not entitled to costs simply because there is no provision for interested parties in our Court Rules.
    In fact, in his submissions, Mr. Mbabazi stated that the Applicants were sued as Interested Parties to prod them to join the proceedings as interveners and/or amicus curiae but they failed to do so. With respect, that argument is speculative and unreasonable. In *McPherson vs. BNB Paribas [2004] 3 AII E. R. 226*, it was held *inter-alia* that "…tribunals should not follow a practice on costs, which might encourage speculative claims, by allowing claimants to start cases in the hope of receiving an offer to settle, failing which, they could drop the case without any risk of a costs sanction."
33. We are in full agreement with the above holding and it follows from what we have so far found and held, that costs are payable when there is a withdrawal of or discontinuance of a Reference or for wrongly impleading a party, unless parties to the Reference on their own volition do otherwise under Rule 51 (2) of the Court's

Rules of Procedure.

34. In light of the above, we hereby make the following orders:
    (a) The Applicants in this matter as well as the IGG, are entitled to costs as prayed from the date of this order until payment in full;
    (b) The Respondent is also condemned to pay costs of this Application.

It is ordered accordingly.

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East African Court of Justice – First Instance Division
Application No.17 of 2014

Arising from Reference No.2 of 2011

**The Attorney General of the Republic of Uganda And The East African Law Society and the Secretary General of the East African Community**

Jean Bosco Butasi, P.J., Faustin Ntezilyayo, J, Fakihi A. Jundu, J
September 11, 2014

*Admissibility of additional digital video disk evidence - Voir Dire - Non compliance with Court orders and Rules.*

*Rules 22(1), 23 (1) of the East African Court of Justice Rules of Procedure, 2013*

On the day that Reference No 2 of 2011 came up for hearing, the 1st Respondent sought the hearing of Application No 17 of 2014 for a preliminary examination to test the competency of a witness or evidence to be produced in the form of an electronic Digital Video Disk. The Attorney General of the Republic of Uganda objected stating that the application had neither been served within the requisite seven days nor complied with the Directions of the Appellate Division.

**Held:** Since the Application had not complied with the directions of the Appellate Division and Rules 22(1) and 23(1) of the Rules, the application was struck out.

**Cases cited:**
The Attorney General of the Republic of Uganda Vs. The East African law Society & The Secretary General of the East African Community, EACJ, Appeal No. 1 of 2013
The East African Law Society Vs. The Attorney General of Uganda & The Secretary General of the East African Community, EACJ Application No. 12 of 2012

**Ruling**

1. On 11th September 2014, when this Court came for the hearing of Reference No.2 of 2011, Counsel for the 1st Respondent in the main Reference (hereinafter "the Applicant") stated that he was not ready for hearing of the above Reference and instead prayed the Court to hear Application No. 17 of 2014 filed on 2nd September 2014 by the Attorney General of Uganda, who had requested that the Application be fixed on the same day as the main Reference.
2. The aforesaid Application seeks orders that:
   "1) This Honorable Court be pleased to conduct a voir Dire in respect of the admissibility of the affidavit of Mr. James Aggrey Mwamu and the electronic Digital Video Disk (DVD) evidence submitted therein filed on the 4th day of March, 2013.

2) This Honorable Court be pleased to find that the said affidavit and electronic DVD evidence submitted by James Aggrey Mwamu is inadmissible.
3) Costs be in the cause."

3. Counsel for the Applicant averred that following the Ruling of the Appellate Division, there was a need to have clear directions on how the matter will proceed in regard with the new evidence adduced. He then asserted that the instant Application aims to determine the admissibility of the Digital Video Disk evidence filed by the Applicant in the main Reference (hereinafter "the Respondent in the Application").
4. Counsel for the 2nd Respondent in the main Reference associated himself with Counsel for the Applicant. Recalling the definition of Voir Dire, to wit "a preliminary examination to test the competency of a witness or evidence", he submitted that the Application ought to be heard.
5. Counsel for the Respondent in the Application contended that following the Ruling of the Appellate Division on the issue at hand, the matter was remitted to this Court for substantive disposal of the Reference on the merits and that, technicalities ought not to constitute an obstacle to the achievement of justice. He then pointed out that he was ready to proceed with the hearing of the Reference. As for Application No. 17 of 2014, he submitted that he was only served on 10th September 2014 and consequently opposed the Application in as much as it is in breach of Rule 23 (1) of the EACJ Rules of Procedure (the "Rules"), since it would deny him the right to reply to the Application if it were to be heard by this Court today. Therefore, learned Counsel urged the Court to proceed with the hearing of main Reference as it was directed to do so by the Appellate Division.
6. Counsel for the Applicant conceded that he did not comply with the timeframe required for serving the Application to the Respondent. He nevertheless reiterated his submission that the Application be heard in order to determine whether or not the DVD evidence is admissible.
7. Having heard from all the parties on this matter, we first and foremost find it necessary to point out that the matter of the production of additional evidence in form of electronic format has been adequately dealt with by this Court in its Ruling delivered on 13th February, 2013. In that regard, the Court found that the evidence to be produced shall be in the form of documentation and also in electronic format and that the Respondents are at liberty to file any evidence in rebuttal to additional evidence. (see EACJ, Ruling in *Application No. 12 of 2012, The East African law Society Vs. The Attorney General of Uganda & The Secretary General of the East African Community*). The same findings were upheld by the Appellate Division (see *EACJ, Appeal No. 1 of 2013, The Attorney General of the Republic of Uganda Vs. The East African law Society & The Secretary General of the East African Community*). Relevant to this Application are the Appellate Division's following conclusions:

"(4) The new evidence will not occasion the Appellant any prejudice; as he will be afforded all reasonable time and opportunity to reply to and rebut that evidence.
(5) In the interests of justice, we order that the proposed evidence be allowed to be adduced – notwithstanding any points of legal technicality that may otherwise arise. ...". The Court thus ordered that "(1) The Appeal is dismissed.
(2) The matter is remitted to the First Instance Division for substantive disposal of the

Reference on the merits."

8. Given the foregoing, we are of the decided opinion that the Appellate Division, in its aforesaid Ruling, has given ample directions on how the matter at hand should be handled. In this regard, it is our view that the Applicant, rather than filing an application, ought to have filed any evidence in rebuttal to the DVD evidence lodged by the Applicant in the main Reference if he so wished, as it was directed by the Court.
9. In the result, Application No. 17 of 2014 cannot be entertained by this Court since it does not comply with Court Orders and Rules 22(1) and 23(1) of the Rules. Accordingly, the Application is struck out.
10. No order as to costs.

It is so ordered.

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East African Court of Justice – First Instance Division
Application No. 18 of 2014

Arising from Reference No. 13 of 2014

**Bonaventure Gasutwa, Tatien Sibomana and Jean-Baptiste Manwangari And Attorney-General of the Republic of Burundi**

Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; & Fakihi A. Jundu, J
November 28, 2014

*Interim Orders pending hearing and determination of the Reference.*

*Article 39 of the Treaty for the Establishment of the East African Community -Rules: 21(2), 73(1) and (2) of the East African Court of Justice Rules of Procedure 2013*

The Applicants are residents of the Republic of Burundi and elected members of the Central Committee of UPRONA as per its Congress held in 2009. A Mr. Bonaventure Niyoyankana and Ms. Concilie Nibigira had been appointed as the President and the Vice President of UPRONA respectively. Mr. Niyoyankana disagreed with some of the members of the Central Committee and he had suspended them. When the suspension was challenged before, the Supreme Court of Burundi, in 2012, it was nullified and the leadership of UPRONA and the Central Committee elected by its Congress in 2009 was recognized and was free to conduct its meetings. Thereafter, Mr. Niyoyankana resigned on 6th January, 2014 as per his letter to the Minister for Home Affairs. On 11th February, 2014 the Minister wrote to Ms. Nibigira recognizing her as the Legal Representative of UPRONA in place of Mr. Niyoyankana. Since then the Applicants has tried in vain to convene the meeting as it was forbidden by the Minister. On 11th July, 2014, the Minister for Home Affairs allegedly wrote to the Minister for Security to take all measures necessary to prevent the said meeting from taking place.

The Applicants therefore filed Reference No 13 and through this application sought interim ex-parte orders claiming that it was urgent that a meeting of the of the UPRONA Central Committee was convened to prepare for the forthcoming General Elections scheduled in May, 2015.

**Held:** An interim order was granted pending hearing and determination of the Reference that allowed the UPRONA Central Committee elected in 2009 to convene its meeting in accordance with the laws of the Republic of Burundi and as resolved by the Supreme Court of Burundi in 2012.

## Ruling

**Introduction**

1. This Application, pursuant to a Notice of Motion filed by the Applicants on 5th September, 2014 under Article 39 of the Treaty for the Establishment of the East African Community ("the Treaty") and Rule 73(1) and (2) of the East African Court of Justice Rules of Procedure 2013 ("the Rules") had sought to obtain interim ex-parte orders or directions, that:-
    1) Pending the hearing and determination of the Reference, this Honourable Court be pleased to grant an interim Ex-Parte order to stay the decision of the Minister for Home Affairs dated on 11th July, 2014, forbidding the Central Committee of UPRONA to hold its meeting.
    2) An order that pending the hearing and determination of the matter Inter-Partes, this Honourable Court be pleased to grant an interim Ex-Parte order that the UPRONA Party is legally authorized to hold the meeting of its Central Committee elected in 2009.
    3) An order that pending the hearing and determination of this matter Inter-Partes, this Honourable Court be pleased to grant an Interim Ex-Parte order that from now up to the final judgment all the decisions and resolutions adopted by the State General of UPRONA are nullified.
    4) The costs of this application be met by the Respondent.
    5) This Honourable Court be pleased to order such further or other orders as it deems fit.
2. On 19th September, 2014, Mr. Horace Ncutiyumuheto, learned Counsel for the Applicants appeared before us in pursuance of the Notice of Motion. He sought to be heard ex-parte and be granted the interim ex-parte orders listed or being sought in the Notice of Motion. He had argued that there was an urgency to obtain the said orders because of the need to convene a meeting of the UPRONA Central Committee in order to make preparations for the forthcoming General Elections to be held in May, 2015. He contended that his clients, the Applicants, had tried in vain to convene the said meeting because the Minister for Home Affairs had forbidden the same to be held. However, this Court, after due consideration declined to proceed to hear the Application ex-parte. First, the Court was not well convinced on the alleged urgency of the matter as advanced by the Applicants' learned Counsel. Secondly, the said learned Counsel did not sufficiently prove or demonstrate that the Applicants will, suffer "irreparable injustice" as envisaged under Rule 21(2) of the Rules. Thirdly, in terms of Rule 73(2) of the Rules, the Court was not satisfied to exercise its discretion to grant the sought orders ex-parte. Fourthly, the Court found out that some of the orders sought by the Applicants, if granted will render the Reference redundant or disposed of. Therefore, the Court ordered the Applicants to serve upon the Respondent the Notice of Motion so as to afford him an opportunity to respond and that the same be heard inter-partes in November, 2014. Having been served, the Respondent on 23rd October, 2014 filed an affidavit in reply to the Notice of Motion opposing the same.
3. We hasten to point out that having declined to hear the application ex-parte, in our

considered view, the only remaining prayer listed in the Notice of Motion that was worth to be heard inter-partes was Prayer No.2 which stated as follows:-

"An order that pending the hearing and determination of the matter inter-partes, this Honourable Court be pleased to grant an Interim Ex-Parte order that the UPRONA party is legally authorised to hold the meeting of its Central Committee elected in 2009".

On 13th November, 2014, when the application was before us for Inter-parte hearing, we guided the parties that the said prayer was the one that the Court will concentrate upon.

**The Applicants' Affidavits**

4. The Applicants have deponed Affidavits in support of the Application. Each one has deponed that he is a citizen and resident of the Republic of Burundi and an elected member of the Central Committee of UPRONA as per its Congress held in 2009. In the said Congress, Mr. Bonaventure Niyoyankana and Ms. Concilie Nibigira had been appointed as the President and the Vice President of UPRONA respectively. Mr. Niyoyankana came into political conflict with some of the members of the Central Committee and had suspended them. The latter, challenged the suspension before the Supreme Court of Burundi and in its decision delivered in 2012, it nullified the same.
5. Each Applicant has deponed further that in its decision, the Supreme Court recognized the leadership of UPRONA and the Central Committee elected by its Congress in 2009 and that it was free to conduct its meetings. Thereafter, Mr. Niyoyankana resigned on 6th January, 2014 as per his letter to the Minister for Home Affairs. The latter, on 11th February, 2014 wrote to Ms. Nibigira recognizing her as the Legal Representative of UPRONA in place of Mr. Niyoyankana. From that time, the Applicants as elected members of the UPRONA Central Committee have tried in vain to convene and hold their meeting as Ms. Nibigira is not convening the said meeting and the Minister for Home Affairs has forbidden it.
6. Each Applicant has deponed that on 9th June, 2014, they wrote to Ms. Nibigira to convene the required meeting, she refused to do so. Thereafter, as per Article 11 of the UPRONA Rules, a third of the Central Committee Members resolved to convene the said meeting themselves. On 11th July, 2014, the Minister for Home Affairs wrote to the Minister for Security to take all necessary measures to prevent the said meeting from taking place. On 13th July, 2014, at about 4:00a.m, a huge number of armed policemen were deployed around and inside the venue of the convened meeting at the Headquarters of UPRONA hence the said meeting could not take place.

**The Respondent's Affidavit in Reply**

7. The Respondent in opposing the Application has vide one Sylvestre Nyanddwi, the Principal Secretary of the Ministry of Justice in the Republic of Burundi deponed an affidavit in reply to the Notice of Motion. In paragraphs 6 – 9 of the said affidavit, the Respondent acknowledges the existence of the UPRONA Party and that the same is headed by Ms. Concilie Nibigira as the President and Legal Representative following the resignation of Mr. Bonaventure Niyoyankana and that no meeting of the

Central Committee can take place without consulting Ms. Nibigira according to Article 13 of the UPRONA Internal Regulations.

8. The Respondent has deponed further that the UPRONA Party under Ms. Nibigira is fully preparing itself to take part in the General Elections to take place in 2015 with or without the Applicants and that it has already nominated members to contest for various positions.
9. In Para 18 of the Affidavit, the Respondent has deponed that Prayer No.2 being sought by the Applicants
"is even more ridiculous because the Applicants indicate that an order be given that pending the hearing and determination of the Reference, the UPRONA Party be legally authorized to hold the meeting of its Central Committee selected in 2009 as if the Central Committee is not holding its meeting…" However, in Para. 16 of his affidavit, the Respondent has deponed that "once the Applicants and their followers wanted to organize a legal meeting the Minister of Home Affairs who is in charge of Political Parties in the Republic of Burundi has no choice but to request that such an illegal meeting be dealt with accordingly…"
10. The Respondent has deponed in Paras. 11 – 13 that the interim orders sought in the Application are the same as those sought in the Reference and that if granted the Applicants will see no rationale of having the main Reference heard hence the Application should be dismissed.

**The Applicants' arguments**

11. On 13th November, 2014, when this Application was heard by this Court, Mr. Ncutiyumuheto, learned Counsel for the Applicants prayed for the Applicants to be granted the interim order being sought because they urgently needed to convene the meeting of the UPRONA Central Committee in order to make preparations for the forthcoming General Elections scheduled to take place in May, 2015. He emphasized that the Applicants need to start preparations for the said General Elections immediately.
12. He insisted on the aforesaid position even when the Court impressed upon him the effect of granting the interim order sought as against the main Reference and granting a final order at the interlocutory stage. As an alternative, he argued that he would agree to fast tracking the Reference as impressed by the Court.
13. Mr. Ncutiyumuheto further argued that Articles 11 and 13 of the UPRONA Party Internal Rules provided that the Central Committee can meet chaired by the President or the Vice President and that the Constitution of the Republic of Burundi also provided for freedom of association, including the holding of its meetings. In addition, he also argued that the Supreme Court of the Republic of Burundi in 2012 had recognized the members of the Central Committee of UPRONA elected in 2009 and that they could hold their meetings as they wished. However, he submitted that the Minister for Home Affairs had sent policemen to stop the said members from holding their meeting and that Ms. Nibigira has refused to convene the said meeting.

**The Arguments of the Respondent**

14. Mr. Nestor Kayobera, learned State Attorney in opposing the Application called upon

this Court to focus on the main Reference rather than on the Application. He argued that UPRONA Party is on the ground and in fact is meeting.

15. He contended that once the interim order sought is granted, there will be no reason to hear the Reference and the Respondent will be denied an opportunity to defend himself against complaints raised by the Applicants.
16. He submitted that the UPRONA Party has many factions but the one on the ground is headed by Ms. Concilie Nibigira, the Chairperson and Legal Representative who took over after Mr. Niyoyankana had resigned. He argued that the other factions of the UPRONA, including the Applicants may not be on the ground, it may be because they are not recognized by law. However, he admitted that the UPRONA Central Committee elected in 2009 is lawful.
17. Though he admitted that UPRONA Central Committee is lawful, he opposed the grant of Prayer No.2 in the Application by consent. He contended that many developments have taken place since 2012 when the Supreme Court of the Republic of Burundi recognized that Committee and he advocated for the matter to go to the main Reference to allow the Respondent to defend himself.
18. When pressed by the Court as to what prejudice the Respondent will suffer if Prayer No.2 is granted taking into account his own assertion that UPRONA is on the ground and is meeting and that its Central Committee elected in 2009 is lawful, he replied "We are not saying that they cannot meet, they can meet in accordance to the law." In actual fact, he responded positively when the Court suggested that Prayer No.2 in the Application and Prayer (d) in the Reference could be granted together if parties consented or agreed.
19. When he was referred to Paragraph 24 of the Respondent's affidavit which contemptuously indicated that this Court is "the source of crises and insecurity in Burundi", Mr Kayobera apologized saying that it was not so intended. The Court seriously warned that it should not be dragged into internal disputes when drafting pleadings.

**The Applicants' Rejoinder arguments**

20. Mr. Ncutiyumuheto, learned Counsel for the Applicants emphasized that the Respondent did not show which law the Minister for Home Affairs used to forbid or stop the meeting of the UPRONA Central Committee while there is a decision of the Supreme Court of the Republic of Burundi allowing the said Committee to convent its meeting.

**Determination**

21. We have carefully considered what the Applicants have stated in the Notice of Motion and in their deponed affidavits in support of the Application plus arguments made by their learned Counsel Mr. Horace Ncutiyumuheto before this Court. Equally, we have carefully considered what the Respondent has deponed in his affidavit in reply to the Notice of Motion plus the arguments advanced by his learned State Attorney Mr. Nestor Kayobera, opposing the Application.
22. Prayer No.2, in the Notice of Motion, which is being sought by the Applicants initially read "Interim Ex-Parte Order." However, on 19th September, 2014, we

declined to hear the Application "Ex-Parte", and ordered that the same be served on the Respondent, which has been done and has now been heard "Inter–Partes" in as far as the said Prayer is concerned.

23. Prayer No.2, in the Notice of Motion or this Application by the Applicants seeks for an interim order that "the UPRONA Party is legally authorized to hold its meeting of its Central Committee elected in 2009" pending the hearing and determination of the Reference. Can this Court grant this Prayer? In other words, the issue, is can this Court authorize or order the said meeting of the UPRONA Central Committee to be convened as prayed for by the Applicants?
24. First, in our considered view, the existence of UPRONA as a political party in Burundi asserted by the Applicants in their affidavits and their arguments before this Court has been admitted by the Respondent in his affidavit and arguments before this Court.
25. Secondly, the Applicants have deponed in their affidavits and argued before this Court that the UPRONA Central Committee in which they allege to be members elected in 2009 was legally recognized by the Supreme Court of the Republic of Burundi in its decision delivered in 2012. The Respondent vide his learned State Attorney, Mr. Kayobera has admitted before this Court that the said UPRONA Committee elected in 2009 and recognized by the Supreme Court of the Republic of Burundi in its decision in 2012 is lawful.
26. Thirdly, we have also considered and taken into account the assertion made by the Applicants in their affidavits and in their arguments before this Court that in its decision in 2012, the Supreme Court of Burundi had mandated the said UPRONA Central Committee to hold or convene its meeting. Indeed, Mr. Kayobera, appearing for the Respondent in his response to the aforesaid assertion contended that UPRONA Party is on the ground and is meeting.
27. Fourthly, we have also considered and taken into account the Applicants' assertion before this Court that apart from the decision of the Supreme Court in 2012 which allowed the Central Committee of UPRONA to convene its meeting, the latter can also be convened in accordance with the Constitution of the Republic of Burundi and Articles 11 and 13 of the UPRONA Internal Rules as submitted by Mr. Ncutiyumuheto. Indeed, Mr. Kayobera for the Respondent in his arguments before this Court stated in admission that:-

    "We are not saying that they cannot meet; they can meet in accordance to the law."

    We construe the assertion of Mr. Kayobera and the aforesaid arguments of the Applicants, that the laws in Burundi allow or permit the UPRONA Party to convene the required meeting.
28. Fifthly, though the Respondent vide Mr. Kayobera had resisted Prayer No.2 that once granted it disposes the main Reference such that it will not give the Respondent an opportunity to defend himself against the complaints raised by the Applicants, our considered view is that apart from Prayer (d) in the main Reference, there are still other Prayers namely (a), (b), (c), (e) and (f) in the said Reference being sought by the Applicants. Further, the Respondent vide Mr. Kayobera could not show what prejudice the Respondent will suffer if Prayer No.2 in the Application is granted taking into account his own assertion before this Court that UPRONA Party is on

the ground and is meeting.

**Conclusion**

29. In our considered view, taking into account all the aforesaid matters, we have no hesitation in terms of Article 39 of the Treaty and Rule 73(1) of the Rules in issuing an interim order pending hearing and determination of the Reference as we hereby do and that the UPRONA Central Committee elected in 2009 convenes its meeting in accordance with the laws of the Republic of Burundi and as resolved by the Supreme Court of Burundi in 2012. In other words, Prayer No.2 is hereby granted as aforesaid and the Application is accordingly disposed of in favour of the Applicants. No order as to costs.

**It is so ordered.**

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East African Court of Justice – First Instance Division
Applications No: 20 & 21 of 2014

Arising from Reference No. 6 of 2014

**UHAI EASHRI and Health Development Initiative – Rwanda**

**And**

**Human Rights Awareness & Promotion Forum (HRAPF) and The Attorney General of the Republic of Uganda**

Jean Bosco Butasi, PJ, Isaac Lenaola DPJ; Faustin Ntezilyayo J, Monica k. Mugenyi J, Fakihi A. Jundu J
February 17, 2015

*Amicus curiae- Bias - Locus standi - Neutrality and objectivity - Territorial scope of an Intervener.*

*Articles 30 and 40 of the Treaty for the Establishment of the East African Community - Rule 36(1),(2)(e),(4), 43(1) and (3) of the East African Court of Justice Rules of Procedure, 2013.*

The Applicants applications were consolidated as they both sought to be joined as amicus curiae in Reference No 6 of 2014 where HRAPF, the First Respondent contested the validity of certain sections of Uganda's repealed Anti-Homosexuality Act, 2014 alleging that they violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

While the 1st Applicant, was an organisation involved in the promotion and development of human and sexual rights in East Africa, The Second Applicant' was an organisation registered in Rwanda with its scope of operation limited to Rwanda. They both claimed to have expertise in the area of human and sexual rights and wished to assist the Court resolve the complex questions posed by the Reference. The 2nd Applicant also alleged that it had an interest in the outcome of the Reference in so far as it pertains to human rights violations.

The Second Respondent opposed the admission of both the Applicants contending that the First Applicant promoted lesbian, gay, bisexual, trans-sexual and intersex (LGBTI) rights within the East Africa, and therefore was not a neutral or impartial party that the information sought to be presented by the Second Applicant included facts and data, contrary to the legally recognised restriction of the role of an amicus curiae's to legal arguments.

**Held:**

1) An applicant must demonstrate: its interest in the outcome of the substantive

Reference; its neutrality and objectivity on the subject matter to the satisfaction of the Court and, circumstances that prima facie justify its appearance as *amicus curiae*.

2) While the Reference involved important questions of law, the Second Applicant did not sufficiently demonstrate how the Court's decision in the Reference would impact its activities given its territorial scope of operation.
3) The *locus standi* granted to residents of EAC Partner States under Article 30(1) of the Treaty mandates such persons to file a Reference before this Court as a party, but it would not form a basis for them to appear as *amicii curiae* in a matter before the Court.
4) A party that seeks to be enjoined as amicus curiae has a duty to demonstrate its neutrality and objectivity on the subject matter it seeks to address the court on.
5) In the EAC jurisdiction, distinction has been drawn between an *amicus curiae* and an intervener: the latter may advocate a point of view in support of one party over another, whereas the former may not it would be neither justified nor just, or in the interests of justice to grant leave to appear as *amicus curiae* to a party that does not pass the test of neutrality that is so pertinent to the role of an a*micus curiae* in this jurisdiction.

**Cases cited:**

Advocats Sans Frontiers v Mbugua Mureithi wa Nyambura & 2 Others, EACJ Application No. 2 of 2013

Attorney General of Uganda v Silver Springs Hotel Ltd & Others Civil Appeal No. 1 of 1989

Forum pour Renforcement de la Societe Civile (FORSC) & 8 Others v Burundian Journalists' Union & Another, EACJ Application No. 2 of 2014

Iron & Steelwares Ltd v C. W. Martyr & Co. (1956) 23 EACA 175 (CA-U)

Mbogo vs. Shah (1968) EA 93 at 96

Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others Petition No. 12 of 2013 (SCK).

United States Tobacco Co. v. Minister for Consumer Affairs [1988] 83 A.L.R. 79 (F.C.A.)

**Ruling**

**Introduction**

1. Applications No. 20 and 21 of 2014 were separately brought under Article 40 of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty), as well as Rule 36(1) and (2) of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as 'the Rules).
2. In Application No. 20 of 2014, UHAI EASHRI (hereinafter referred to as the First Applicant) sought to be joined as *amicus curiae* in Reference No. 6 of 2014 Human Rights Awareness and Promotion Forum (HRAPF) vs. Attorney General of Uganda. Similarly in Application No. 21 of 2014, Health Development Initiative – Rwanda (hereinafter referred to as the Second Applicant) sought to be joined as amicus curiae in the same Reference.
3. In Reference No. 6 of 2014, HRAPF (hereinafter referred to as 'the First Respondent)

had contested the validity of certain sections of Uganda's now repealed Anti-Homosexuality Act, 2014 in so far as they allegedly violated Articles 6(d), 7(2) and 8(1)(c) of the Treaty.

4. At the hearing of the Applications, learned Counsel for the Applicants successfully applied to have them consolidated, hence the present Consolidated Application. The Applicants were both represented by Mr. Colbert Ojiambo; the First Respondent was represented by Mr. Ladislaus Rwakafuuzi, while Ms. Patricia Mutesi and Ms. Josephine Kiyingi appeared for the Second Respondent.

**Applicants' Case**

5. Application No. 20 of 2014 was premised on the following grounds:
   a. As an organisation that seeks to positively influence policies and practices on human and sexual rights, the First Applicant had an interest in the conduct and outcome of Reference No. 6 of 2014 (hereinafter referred to as 'the Reference') in so far as it pertains to a statute on sexual rights ;
   b. As an organisation that is actively involved in the promotion and development of human and sexual rights in the East African region, and mandated to conduct research on, as well as collate and disseminate information about the said rights for purposes of institutional development, the First Applicant had acquired sufficient expertise in the area of human and sexual rights that it wished to draw to the Court's attention to assist it resolve the complex questions posed by the Reference;
   c. This Court's decision would be a benchmark for policy makers and legislators in the East African region, therefore it was fair and just to permit an entity with knowledge of the legal landscape of other countries in the region to avail the Court with information that would assist it arrive at a wholesome decision ; and
   d. Granting the Application would cause no prejudice to the Respondents.
6. On the other hand, the grounds outlined in Application No. 21 of 2014 were materially similar to those highlighted in clauses (ii), (iii) and (iv) above, with the additional ground that as an organisation that seeks to *inter alia* contribute to and educate young people on HIV/ AIDS, malaria, tuberculosis, reproductive health, sexually transmitted diseases and other preventable diseases, the Second Applicant had an interest in the outcome of the Reference in so far as it pertains to human rights violations.
7. Responding to questions from the Bench, Mr. Ojiambo contended that although the Second Applicant was operative in Rwanda while the applicability of the Anti-Homosexuality Act that was in issue under the Reference was restricted to Uganda, nonetheless, the Treaty mandated any member of the East African Community (EAC) to challenge a law of any EAC Partner State if it was deduced to contravene Treaty provisions.

**Respondents' Case**

8. Whereas the First Respondent did not contest the Consolidated Application, the Second Respondent did oppose it and specifically filed an Affidavit in Reply in respect of Application No. 20 of 2014.

9. In opposing Application No. 20 of 2014, the Second Respondent relied on the Affidavit of one Oburu Odoi Jimmy, in which he averred that literature that he had accessed from the First Applicant's website (www.eahi-uashri.org) depicted it as an organisation that promoted lesbian, gay, bisexual, trans-sexual and intersex (LGBTI) rights within the East African region, and therefore was not a neutral or impartial party as is legally required of an *amicus curiae*. The literature in question was duly appended to the deponent's Affidavit.
10. It was argued for the Second Respondent that the First Applicant had no legal expertise to bring to the Reference as this Court was capable of interpreting the relevant legal provisions without assistance. Ms. Mutesi argued that the First Applicant was partial in so far as it advocated for LGBTI rights; was incapable of providing the Court with a neutral and unbiased opinion as was required of an amicus curiae; would serve better as an expert witness for the Applicant in the Reference given that they were advancing the same position, and allowing the Application would occasion injustice to the Second Respondent. It was Ms. Mutesi's contention that although the decisions of this Court were binding on EAC Partner States, that was not a legal basis for the grant of an application to appear as *amicus curiae*.
11. On the other hand, the Second Respondent opposed Application No. 21 of 2014 on grounds that the information sought to be presented by the Second Applicant included facts and data, contrary to the legally recognised restriction of *amicus curiae's* role to legal arguments; the said Applicant sought to go beyond the pleadings in the Reference and make reference to laws of other countries, and had not demonstrated its interest in Reference No. 6 of 2014 as required by Rule 36(2)(e) of the Rules, neither had it demonstrated any justification for the prayer sought in the Consolidated Application as prescribed in Rule 36(4).

    Applicants' Rejoinder
12. In a brief rejoinder, Mr. Ojiambo contended that the scales of justice tilted towards the grant of the Consolidated Application, whereupon the Court would be at liberty to only rely upon such submissions from the *amicus curiae* as were deemed to be neutral.

**Court's Determination**

13. Rule 36 of this Court's Rules provides for an application for leave to appear before this Court as amicus curiae. Literally translated to mean 'a friend of court', an *amicus curiae* has been defined as 'a person who is not a party to a law suit but who petitions the Court to file a brief in the action because that person has a strong interest in the subject matter.' See *Black's Law Dictionary, 7th Edition*.
14. Rule 36(2)(e) and (4) highlights the parameters against which an application for leave to appear as *amicus curiae* may be allowed. Whereas Rule 36(2)(e) necessitates the demonstration of an interest in the outcome of the case in which an applicant seeks to appear, Rule 36(4) prescribes the additional test of justification as a basis for the grant of leave to appear as *amicus curiae*.
15. For ease of reference, we reproduce the cited Rules below:

    "Rule 36(2)(e)

    (2) An application under sub-rule (1) shall contain –

(a) ….
(b) …..
(c) ….
(e) a statement of the intervener's or *amicus curiae's* interest in the result of the case.
Rule 36(4)
"If the Court is satisfied that the application is justified, it shall allow the intervention and fix a time within which the intervener or amicus curiae may submit a statement of intervention."

16. In the instant case, both Applicants did include a Statement of Interest in their respective pleadings. Their Statements of Interest were substantially identical, save for being grounded in each Applicant's respective Memorandum and Articles of Association (MemArts). We propose to address Application No. 21 of 2014 prior to a determination of Application No. 20 of 2014.
17. The Second Applicant's interest in the Reference is captured in the following statement in Application No. 21 of 2014:
"Therefore, the Applicant has an interest in the conduct and outcome of this matter in so far as the Reference seeks this Honourable Court's determination as to whether Uganda is in violation of the fundamental principles of the Treaty …. The Applicant recognises that the potential impact of the decision of the Honourable Court in the proceedings in the Reference will extend beyond the borders of Uganda into other Member States, which are not represented before the Court."
18. The Second Applicant's Certificate of Compliance reveals that it is registered in Rwanda, while Article 2 of its MemArts limits its scope of operation to Rwandans. The Article reads:

**The Association shall have the following objectives:**
"To build capacities of Rwanda and institutions in the health sector to benefit all Rwandans."

19. The import of Rule 36(2)(e) and (4) is to place a two-faceted duty upon an applicant for leave to be joined as amicus curiae: first, such applicant must demonstrate that it has an interest in the outcome of the substantive Reference and, secondly, the applicant must establish to the satisfaction of the Court circumstances that prima facie justify its appearance as amicus curiae. We find appropriate guidance on justification for the designation of a party as *amicus curiae* in the following preposition by Mohan, S. Chandra, '*The Amicus Curiae: Friends No More?', 2010,* Singapore Journal of Legal Studies, 352 – 371, p.14:
"An amicus is normally appointed if the court is of the view that a case involves important questions of law of public interest; if a party that is unrepresented would not be able to assist the court; or if the points of law do not concern the parties involved but is nevertheless a matter of concern to the court."
20. We are unable to deduce any purported interest in the outcome of the Reference with regard to the Second Applicant for the following reasons. First, the applicability of the Anti-Homosexuality Act that is in issue in the Reference is restricted to the Republic of Uganda. It is inapplicable to the Rwandan people and institutions per se, and is certainly not operative law in the Republic of Rwanda. Secondly, even if

one sought to impute interest in the Reference from the Second Applicant's focus on health rights (as this Court understood Mr. Ojiambo to argue), a purposive interpretation of Article 2 of the Second Applicant's MemArts reveals that the health rights it advocates for pertain to its territorial scope of operation only, namely, the Republic of Rwanda. Therefore, we are not satisfied that the Second Applicant has demonstrated an interest in the outcome of the Reference that would warrant its appearance as *amicus curiae*.

21. Further, whereas we do recognise that the Reference involves important questions of law on a matter of immense public interest, we do not deduce the Second Applicant's territorial scope of operation to present legal issues that are pertinent to the determination of the Reference in so far as they do not relate to the territorial jurisdiction within which the Statute in issue therein applies. Indeed, we do not find sufficient demonstration by the Second Applicant that this Court's decision in the Reference would impact on its activities given its territorial scope of operation.
22. Finally, we must clarify that the *locus standi* that is granted to residents of EAC Partner States under Article 30(1) of the Treaty mandates such persons to file a Reference before this Court as a party thereto, but would not form a basis for them to appear as *amicii curiae* in a matter before the Court. An applicant that seeks to appear as *amicus curiae* must satisfy the parameters highlighted in Rule 36 of the Rules. For the above reasons, we would disallow Application No. 21 of 2014.
23. On the other hand, the First Applicant's interest in the Reference is captured in the following statement in Application No. 20 of 2014:
"Therefore, the Applicant has an interest in the conduct and outcome of this matter in so far as the Reference seeks this Honourable Court's determination as to whether Uganda is in violation of the fundamental principles of the Treaty …."
24. The foregoing statement is grounded in the First Applicant's corporate objectives as reflected in its MemArts and restated in paragraph 5 above. Clause 2(a) of the said MemArts specifically designates it as a company that is registered in Kenya, the objective of which is to seek to advance education within the East African region in sexual health rights and best practice in this area. Given that the territorial scope of its operation includes Uganda, we are satisfied that the First Applicant has demonstrated an interest in the outcome of the Reference as required by Rule 36(2)(e).
25. Having so found, we revert to a consideration of whether the First Applicant has satisfactorily demonstrated circumstances that would justify its appearance in the Reference as amicus curiae. Clearly, Rule 36(4) grants the Court wide discretionary powers. It is now a well recognised principle of judicial practice that courts must exercise their discretionary powers judiciously and not in a manner that would cause injustice to one party. See *Mbogo vs. Shah (1968) EA 93 at 96*. It is also well appreciated that rules of procedure are 'intended to be hand maidens of justice, not to defeat it (justice).' See *Iron & Steelwares Ltd vs. C. W. Martyr & Co. (1956) 23 EACA 175 (CA-U)*.
26. We have carefully scrutinised all the material on record in Application No. 20 of 2014. We find that the literature appended to the Affidavit of one Oburu Odoi Jimmy does depict the First Applicant as an organisation that advocates for and promotes LGBTI rights. The Applicants did not controvert this literature by way of counter-

affidavit, therefore it is deemed to have been admitted under Rule 43(1) and (3) of the Rules.

27. Mr. Oburu's averments are in alignment with Clause 2(d)(v) of the First Applicant's MemArts which states one of the objectives of the First Applicant as follows:
"To seek to positively influence policies and practices … towards supporting the development of human and sexual rights of all, social justice and further improve access to such human and sexual rights together with economic and socio-cultural rights particularly among previously excluded members of society."
28. Further, in his submissions in support of the Application, learned Counsel for the Applicants did establish a nexus between the sexual rights advocated by the First Applicant and such rights as are addressed by the Anti-Homosexuality Act that is in issue in the Reference in the following terms:
"The main issue that is before this Court in the Reference is around an Act of Parliament from the State of Uganda and it touches on issues of sexual rights. The Applicant has been actively involved in advocating for the sexual rights … Having actively been involved in the promotion of these rights, it will be in the interest of justice that the Applicant be allowed to participate in the proceedings … It will in effect affect all its activities as an organisation."
29. A 'friend of court' assists the court by providing information so that the court will not fall into error, but does not seek to influence the final outcome or attempt to persuade the court to adopt a particular point of view, whether or not he has a direct interest in the outcome. See *Mohan, S. Chandra, 'The Amicus Curiae: Friends No More?', Ibid., p. 3*. Thus, in the Australian case of *United States Tobacco Co. v. Minister for Consumer Affairs [1988] 83 A.L.R. 79 (F.C.A.)*, it was held:
"An amicus curiae (as opposed to an intervenor) has no personal interest in the case as a party and does not advocate a point of view in support of one party or another."
30. Indeed, in the case of *Advocats Sans Frontiers vs. Mbugua Mureithi wa Nyambura & 2 Others Application No. 2 of 2013*, this Court did cite with approval the decision of the Supreme Court of Uganda in *Attorney General of Uganda vs. Silver Springs Hotel Ltd & Others Civil Appeal No. 1 of 1989* that 'one of the fundamental considerations for any amicus curiae to be admitted is that such a party must be independent of the dispute between the parties.' Further, in the case of *Forum pour Renforcement de la Societe Civile (FORSC) & 8 Others vs. Burundian Journalists' Union & Another Application No. 2 of 2014*, this Court pronounced itself on the duty of an amicus curiae in the following terms:
"The *amicus curiae* has on the other hand, the most onerous duty of ensuring that it gives only the most cogent and impartial information to the Court or risk losing the respect and friendship of the Court."
31. In the instant case, the Anti-Homosexuality Act, 2014 clearly sought to *inter alia* prohibit any form of sexual relations between persons of the same sex or the promotion or recognition of such relations in Uganda. Against that background, it is manifestly apparent that the spirit and letter of that Act run contrary to the objectives of the First Applicant. It follows, then, that it would be illogical to attribute neutrality to the First Applicant, or expect cogent, objective and impartial assistance from it on the matter before this Court in the Reference. In our considered view, a party that seeks to be

enjoined as amicus curiae has a duty to demonstrate its neutrality and objectivity on the subject matter it seeks to address the court on. In Application No. 20 of 2014, the material before this Court runs contrary to that test of neutrality. Perhaps more importantly, the participation of such a demonstrably non-neutral party as amicus curiae in the Reference would be a dereliction of this Court's duty to exercise its discretionary powers judiciously and not in a manner that would cause injustice to one party.

32. In the EAC jurisdiction, distinction has been drawn between an amicus curiae and an intervener: the latter may advocate a point of view in support of one party over another, whereas the former may not. See *Rule 36* of the Court's Rules of Procedure and *Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others Petition No. 12 of 2013 (SCK)*. We think that this is a useful distinction to distinguish between a party to a suit that has locus standi in a matter; an intervener that, while not having locus standi in a matter, does have a partisan interest therein, and an amicus curiae that has an interest in providing objective, cogent assistance to courts to engender the advancement of legal jurisprudence on a given subject. Consequently, we are satisfied that it would be neither justified nor just, or in the interests of justice to grant leave to appear as amicus curiae to a party that does not pass the test of neutrality that is so pertinent to the role of an amicus curiae in this jurisdiction.
33. In the result, Application No. 20 of 2014 is disallowed. We hereby dismiss the Consolidated Application with costs to the Second Respondent.

It is so ordered.

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East African Court of Justice – First Instance Division
Application No. 23 of 2014

Arising from Reference No. 17 of 2014

**Rt. Hon. Margaret Zziwa, The Speaker of the East African Legislative Assembly And The Secretary General of the East African Community**

Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Monica K. Mugenyi, J & Fakihi A. Jundu, J
December 16, 2014

*Burden of obtaining ex-parte interim orders - Irreparable injury different from irreparable injustice – The principle of separation of powers between Commuity organs.*

*Article 39, 53(3) of the Treaty for the Establishment of the East African Community - Rules 21and 22 of the East African Court of Justice Rules of Procedure, 2013*

The Applicant was the Speaker of the East African Legislative Assembly. In March 2014, some Members of EALA gave notice of intention to move a Motion for a resolution to remove the Applicant from Office. Proceedings in that regard were later terminated by the Applicant in a Ruling delivered on 4th June 2014 for reasons that some of the Members of the Assembly had withdrawn their support for the resolution. On 26th November 2014, the Assembly renewed the issue of removal of the Applicant and resolved to refer the matter for investigation by its Committee of Legal, Rules and Privileges. It also resolved to suspend the Applicant for 21 days pending a report of the said Committee. The Assembly also resolved to meet on 17th December 2014 to discuss the Report of the Committee. This led the Applicant to file Reference No. 17 of 2014 and the present Application.

The Applicant sought for ex-parte interim orders restraining the Respondent from convening on the 17th December 2014 and considering the Committee Report intended to move a Motion for a resolution to remove the Applicant/Speaker of the EALA from office.

**Held:**

1) Irreparable injury was not the same as irreparable injustice. While real or perceived damage to reputation may be an irreparable injury it is not necessarily an irreparable injustice.
2) Irreparable injustice is injury that cannot be adequately measured or compensated by money.
3) Since the Applicant had made representations to the Committee of Legal, Rules and Privileges, to pre-judge the Committee's decision and that of the Assembly on the objections raised to the proceedings would be unjust.
4) The burden of a party seeking an *ex-parte* order is high and, noting the history of the

dispute between the Applicant and the Assembly of which she is the Speaker, and bearing in mind the need to maintain the principle of separation of power we are unable to accept the Applicant's case that she is entitled to any *ex-parte* orders.

**Ruling**

**Introduction**

1. The Application dated 10th December 2014 is premised on Article 39 of the Treaty for the Establishment of the East African Community (hereinafter referred to as the "Treaty") and Rules 21and 22 of the East African Court of Justice Rules of Procedure (hereinafter referred to as "the Rules"). The Applicant, Rt. Hon. Margaret Zziwa, is the Speaker of the East African Legislative Assembly (hereinafter referred to as the " EALA") and she seeks ex-parte orders in the following terms:
   "a) This Honorable Court be pleased to dispense with service of this Notice of Motion and hear the Motion and grant an *ex-parte* order in the First Instance Court owing to the urgency of the matter [sic];
   b) This Honorable Court be pleased to dispense with some Rules in the first instance as the delay that shall be caused by proceeding in the ordinary way would entail irreparable injustice in relation to these proceedings owing to the urgency of the matter [sic];
   c) The East African Legislative Assembly is prohibited and restrained from convening on the 17th December 2014 for purposes of considering the Committee Report intended to move a Motion for a resolution to remove the Applicant/Speaker of the EALA from office.
   d) The Assembly Committee of Legal, Rules and Privileges be restrained from conducting any further investigations in this matter or tabling any report in the Assembly pending the hearing and determination of the Reference filed in this Honorable Court.
   e) That costs of and incidental to this Application be provided for."
2. The Application is supported by grounds on the face of it as well as an Affidavit in support sworn by the Applicant on 10th December 2014. We have taken note of both the said grounds as well as the contents of the Affidavit.
3. In brief, what happened was that sometime in March 2014, some Members of the EALA gave notice of intention to move a Motion for a resolution to remove the Applicant from Office. Proceedings in that regard were later terminated by the Applicant in a Ruling delivered on 4th June 2014 for reasons that some of the Members of the Assembly had withdrawn their support for the resolution. A Reference filed by the Applicant in this Court (EACJ Reference No. 3 of 2014) was also withdrawn for the same reasons.
4. On 26th November 2014, the Assembly convened in Nairobi, renewed the issue of removal of the Applicant and resolved to refer the matter for investigation by its Committee of Legal, Rules and Privileges. It also resolved to suspend the Applicant for 21 days pending a report of the said Committee. The Assembly later also resolved to meet on 17th December 2014 to discuss the Report of the Committee and that is what triggered the filing of Reference No. 17 of 2014 and the present Application.

5. In the above context, it should be recalled that a party seeking *ex-parte* orders is obligated by Rule 21(2) of the Rules to show that:
   a) Proceeding in the normal way would cause delay and;
   b) The delay would or might entail irreparable injustice.
   Rule 73(2) of the Rules also provides that the Court may grant an ex-parte interim order "if satisfied that it is just to do so."
6. In submissions, Mr. Jet John Tumwebaze in addressing the expectations of the above Rules stated that the Applicant stands to suffer irreparably because;
   i) if the proceedings of the Assembly were in violation of the Treaty in that a "Temporary Speaker", a title unknown to Community Law, presided over the alleged suspension;
   ii) the Applicant has been a public figure with over 14 years' experience and her reputation will be ruined if she is impeached for alleged incompetence and misconduct;
   iii) the notice of the Assembly's meeting for 17th December 2014 was made outside the Assembly's Calendar of activities;
   iv) all her protestations about the unlawful conduct of Members of the Assembly have been ignored and that the single agenda for the meeting of 17th December 2014 is her removal and that if the orders sought are denied and the removal is allowed, then she stands to "suffer irreparable injury."
   v) the Application ought to be dispensed with in a timely manner as it is urgent and is meant to ensure the adherence of the rule of law by the Assembly.
7. In addition, he submitted that the Court has the authority and mandate to issue the orders sought under Article 27 of the Treaty and it should not wait to undo any damage that the removal of the Applicant would cause to her and the East African Community.
8. Further, that the bias of some members of the Committee of Legal, Rules and Privileges crystallised when they refused to recuse themselves from the Committee's proceedings.

**Determination**

9. We have considered the above submissions and the Application under consideration in the context of the proviso to Rules 21(2) as well as Rule 73 and we have no doubt in our minds that the matter is urgent. We say so because the Report of the Committee aforesaid is scheduled for tabling and discussion on 17th December 2014, only a day away. The Applicant's fate as Speaker may well depend on the outcome of the sitting of the Assembly and so we deem it appropriate that the Application should be heard ex-parte at the first instance.
10. Turning back to the specific prayers sought, we note that prayer (c) is final in nature and we do not know what would be heard inter-partes if we grant it. Prayer (d) is only partly final in nature and there is certainly something to be said about it the ex-parte stage.
11. Having so said, however, has the Applicant established that she will suffer irreparable injustice if the Application is not granted? In submissions as well as in ground no. 7 in support of the Application and paragraph 52 of the supporting Affidavit, the

Applicant argued strenuously that she will suffer "irreparable injury". Such injury in our view is not the same as "irreparable injustice". Damage, real or perceived, to reputation may indeed be an irreparable injury but not necessarily an irreparable injustice. "Justice" is defined as "the fair and proper administration of laws" while "irreparable injustice" is "injury that cannot be adequately measured or compensated by money". (See *Black's law Dictionary, 9th Edition*)

12. Damage for reputation can certainly be compensated by money contrary to the Applicant's submissions, but if we also heard the Applicant well, she was arguing that being subjected to an unlawful process is an injustice. That may well be so, but where is the evidence that such an injustice is irreparable?
13. When we enquired of Mr. Tumwebaze whether the alleged injustice cannot be undone in the future, he stated that the *Anyang' Nyong'o case* is a good example of a situation where this Court arrested an unlawful situation by granting an injunction. The learned counsel neither gave us the citation for that case nor referred us to any of the many decisions of this Court that involved *Prof. Anyang' Nyang'o*. That fact notwithstanding, however, it was upon the Applicant to show the irreparability of any injustice that the process of the removal may cause to her, but she failed that test, in our eyes.
14. It is also our view that since the Applicant (through her advocates) made representations to the Committee, to pre-judge its decision and that of the Assembly on all the objections raised to the proceedings would be unjust, a path this Court refuses to take.
15. We also note that Article 53(3) of the Treaty provides for the removal of the Speaker of the Assembly and so any holder of the office ought to know that that possibility is always alive and pursuing that course of action will not amount to irreparable injustice to the Applicant.
16. Lastly, the burden of a party seeking ex-parte order is high and in the present case, noting the history of the dispute between the Applicant and the Assembly of which she is the Speaker, and bearing in mind the need to maintain the principle of separation of power (with necessary checks in appropriate circumstances), we are unable to accept the Applicant's case that she is entitled to any *ex-parte* orders.
17. In the event, let the Application dated 10th December 2014 be fixed for hearing inter-partes.

Conclusion

18. In the final result, we do hereby dismiss this Application with no order as to costs.

It is so ordered.

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East African Court of Justice – Appellate Division
Appeal No. 1 of 2014

Appeal from the Judgment in Reference No.2 of 2012, First Instance Division before - Jean Bosco Butasi, PJ; Mary Stella Arach-Amoko, DPJ; John Mkwawa, J; Isaac Lenaola, J; and Faustin Ntezilyayo, J dated 29th November 2013

**Democratic Party And The Secretary General of the East African Community, The Attorney General of the Republic of Uganda, The Attorney General of the Republic of Kenya, The Attorney General of the Republic of Rwanda & The Attorney General of the Republic of Burundi**

Before: E. Ugirashebuja, P; L. Nkurunziza VP; J. Ogoola JA; E. Rutakangwa, JA; A. Ringera JA
July 28, 2015

*Adherence to the African Charter - Application of relevant international instruments - EAC Partner States to act in good faith - Jurisdiction- Deposit of declarations in the African Court- Whether the First Instance Division erred in holding that it had no jurisdiction to interpret the African Charter.*

*Articles 5, 6, 7(2),8(1) (c), 23, 27, 29(1),30, 126 and 130 of the EAC Treaty; Article 34(6)of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights - The Vienna Convention of the Law of Treaties.*

The Appellant averred that the 2nd, 3rd, 4th, and 5th Respondents were all signatories to the African Charter on Human and Peoples Rights and the Protocol and yet they had failed, refused or delayed to make declarations to accept the competence of the African Court on Human and Peoples rights as required by Articles 5(3) and 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples Rights. Their failure to do so meant that individuals and non-governmental organisations could not institute cases directly before the African Court and this constituted an infringement of Articles 6(d) and 7(2) of the Treaty Establishing the East African Community.

On their part, the 1st Respondent submitted that there was no Treaty provision that obliged the 1st Respondent to compel a State Party to make their declaration and the 2nd, 3rd and 5th Respondents contended that the Applicant had not cause of action and there were no time frames for them to deposit their declarations.

The First Instance Division held that even if the Court could properly invoke Articles 6(d), 7(2), 126 and 130 of the Treaty, the facts did not point to a violation and if there was a violation of the African Charter and Protocol, the Court was not the right forum to challenge such violation. Thus, neither the 1st Respondent nor the Court

could compel the 2nd, 3rd, and 5th Respondents to deposit their declarations.

**Held:**

1) Articles 6 (d) and 7(2) of the Treaty empower the Court to apply the provisions of the African Charter, the Vienna Convention, as well as any other relevant international instrument to ensure the Partner States' observe provisions of the Treaty. Therefore, the Court has the jurisdiction to interpret the Charter in the context of the Treaty.
2) The wording in Article 6(d) "…in accordance with the provisions of the Protocol of the African Charter on Human and Peoples' Rights", creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter. Failure to do so constitutes an infringement of the Treaty.
3) The wording of the Article 34(6) of the Protocol allows an elastic margin of discretion within which State Parties may deposit their declarations. It does not provide for any constraining time frame beyond which a State Party which has not yet deposited its declaration can be said to have violated the Protocol. Thus, there is no violation of the Charter, or of the Protocol.
4) The order of the First Instance Division that this Court had no jurisdiction to ensure adherence to the provisions of the African Charter and its Protocol was therefore set aside.

**Cases cited:**

Callist Mwatela & Others v. Secretary General of the East African Community, EACJ, Reference No.1 of 2005

Factory at Chorzow (Germany v. Poland.), 1927 P.C.I.J. (ser. A)

Independent Medical Legal Unit v. Attorney General of the Republic of Kenya EACJ Appeal No.1 of 2011

James Katabazi v. the Secretary General of the EACJ Reference No.1 of 2007

Prof. Anyang' Nyongo & 10 Others v. AG Kenya & Others EACJ Reference No.1 of 2006.

The Attorney General of the Republic of Rwanda v Plaxeda Rugumba, EACJ Appeal No.1 of 2012

**Judgment**

**Introduction**

1. This is an appeal by the Democratic Party (" the Appellant") against the Judgment of the First Instance Division dated 29th November 2013 in Reference No. 2 of 2013, by which that Division dismissed the Reference by holding that it had jurisdiction to ensure the adherence to the law in the interpretation and application of and compliance with the Treaty for the Establishment of the East African Community ("the Treaty"); but that it had no jurisdiction to ensure adherence to the provisions of the African Charter on Human and Peoples' Rights ("the Charter") and its Protocol("the Protocol")
2. The Appellant lodged the Reference before the First Instance Division of this Court challenging a delay by the 2nd, 3rd, 4thand 5th Respondents to deposit their declarations under Articles 5(3) and 34 (6) of the Protocol. The Appellant contended

that such delay constituted an infringement of Articles 5,6, 7(2),8(1) (c), 126 and 130 of the Treaty; and Articles 1,2,7,13,26,62,65 and 66 of the Charter.

3. Before the First Instance Division, the issues raised were as follows:
   1) Whether the Court had jurisdiction to entertain the Reference;
   2) Whether the issues as presented were justiciable;
   3) Whether the Reference disclosed a cause of action against the 1st and 4th Respondents;
   4) Whether the Applicant had locus standi to present the Reference;
   5) Whether the delay by the 2nd, 3rd, 4th and 5th Respondents to deposit their respective declarations was a violation of Articles 5,6,7,8(1)(c), 126 and 130 of the Treaty; Articles 1(2), 7, 13, 26, 62, 65 and 66 of the Charter; and Articles 1, 2, 3, 5 and 34 of the Protocol;
   6) Whether the 1st Respondent had a duty under the Treaty, the Charter or the Protocol to compel and/ or to supervise the 2nd, 3rd, and 5th Respondents in depositing their declarations under Article 34 (6) of the Protocol;
   7) Whether the Parties were entitled to the remedies sought.
4. On the 1st issue, the First Instance Division held that it had the requisite jurisdiction to determine the issues raised in the Reference. However, the same Court held that it had no jurisdiction to interpret other international instruments and specifically the Charter and its Protocol.
   i. On the 2nd issue, the First Instance Division held that the issues placed before it were justiciable.
   ii. On issue No 3, the First Instance Division held that in the context of the Reference before it, neither the facts nor the eventual remedy to be granted or denied would create a cause of action against the 1stRespondent.
   iii. On issue No. 4, the First Instance Division resolved that the Applicant had locus standi.
   iv. On issue No.5, the First Instance Division found no contravention of the Treaty, the Charter, or the Protocol.
   v. On issue No.6, the First Instance Division held that the answer to issue No.3 (cause of action) was sufficiently disposed of this particular issue.
   vi. On issue No.7, the First Instance Division held that each Party should bear its own costs.
5. Accordingly, the First Instance Division dismissed the Reference; and ordered each Party to bear its own costs.

   Dissatisfied with the Judgment of the First Instance Division, the Appellant appealed to this Appellate Division.
6. The Appellant raised 9 grounds of Appeal which, at the Scheduling Conference were consolidated into the following 5 issues:-
   (i) Whether the First Instance Division erred in law when it held that it had no jurisdiction to interpret the Charter, the Protocol, and other relevant international conventions and instruments to which the 2nd ,3rd and 5th Respondents are parties;
   (ii) Whether the First Instance Division erred in law when it held that the delay by the 2nd, 3rd and 5th Respondents in depositing their respective declarations was

not a violation of the provisions of the Treaty, and of the Charter, the Protocol and the 1969 Vienna Convention of the Law of Treaties (the Vienna Convention),

(iii) Whether the First Instance Division erred in law when it held that the 1st Respondent had no duty under the Treaty to supervise the 2nd, 3rd and 5th Respondents to comply with their obligations under the Charter; the Protocol 1969 Vienna Convention;

(iv) Where the First Instance Division erred in law when it refused to award costs against the 1st, 2nd, 3rd and 5th Respondents; and

(v) Whether the Appellant is entitled to the remedies sought.

In course of the Scheduling Conference, the prayer against the 4th Respondent was abandoned by the Appellant.

**Background**

7. The brief background to this Appeal is set out in paragraphs 4, 5, 6, 7 and 8 of the Judgment of the First Instance Division, dated 29th November 2013. Those paragraphs recounts the facts as follows:-

i. That the Republics of Uganda, Kenya, Rwanda and Burundi are all signatories to the Charter and the Protocol.

ii. That Article 34 (6) of the Protocol provides as follows:-
"At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration."

iii. That, Article 5 of the said Protocol provides as follows:-
"1. The following are entitled to submit cases to the Court:-
a) The Commission;
b) The State Party which has lodged a complaint to the Commission;
c) The State Party against which the complaint has been lodged to the Commission;
d) The State Party whose citizens is a victim of human rights violation; and
e) African Inter-governmental Organizations.
2. When a State Party has an interest in a case, it needs to submit a request to the Court to be permitted to join.
3. The Court may entitle relevant non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol."

iv. That during the pendency of the proceedings, Rwanda complied with the provision of Article 34(6) of the Protocol, by depositing its declaration, dated 22nd January, 2013.

v. That the 1st Respondent got information of such allegations, but failed to carry out his supervisory role.

vi. That when the above declaration was brought to the attention of the Applicant, the Reference as against Rwanda was abandoned on 22nd August, 2013. Accordingly, the only issue to address at the end of the Judgment of the First Instance Division was whether to award costs against the Republic of Rwanda.

vii. That with regard to the 2nd, 3rd, and 5th Respondents, it is not contested that they have not filed any declaration pursuant to Article 34(6) of the Protocol which is the gist of the Application.

**The Appellant's Submissions**

8. The Appellant presented legal arguments for each ground of Appeal, starting with the first issue as follows:-
   Issue No.1. Whether the First Instance Division erred in law in holding that it had no jurisdiction to interpret the Charter, its Protocol and other relevant international conventions and instruments to which the 2nd, 3rd and 5th Respondents are parties.
9. In support of its argument on this 1st issue, the Appellant relied especially on the fact that the 2nd, 3rd, and 5th Respondents are all signatories of the Charter, and the fact that there are several provisions in the Treaty which create obligations for the EAC Partner States to protect human rights in accordance with the Charter. In this respect, the Appellant cited Articles 5, 6(d), 7(2), 126, 130, 131 of the Treaty; and took into account Article 23 of the same Treaty which provides, among others, that the Court shall be a judicial body which shall ensure the adherence to law in the interpretation of and compliance with the Treaty.
10. Having cited the above Articles of the Treaty, the Appellant drew a legal implication that the First Instance Division erred in law when it held that it had jurisdiction over the interpretation and application of the Treaty, but that it has no jurisdiction to interpret Articles 1(2), 7, 13, 26, 62, 65 and 66 of the Charter, nor Articles 1, 3, 5 and 34 of the Protocol.
11. Furthermore, the Appellant contended that the East African Court of Justice has on several occasions held that it had jurisdiction over principles of the rule of law and over matters that impact on human rights. In that regard, he relied among others on the case of J*ames Katabazi v. the Secretary General of the EACJ [Ref No.1 of 2007, Judgment of 20 November 2007*].
    Issue No.2. Whether the First Instance Division erred in law when it held that the delay by the 2nd , 3rd and 5th Respondents in depositing their respective declarations was not a violation of the provisions of the Treaty, and of the Charter, the Protocol, and the Vienna Convention.
12. With regard to this issue, the Appellant submitted that the 2nd, 3rd,4th and 5th Respondents have signed, ratified or acceded to the Charter and the Protocol. Consequently, the Appellant averred that the First Instance Division erred in law when it held that the delay by the 2nd, 3rd, and 5th Respondents to deposit their respective declarations was not a violation of Articles 5, 6, 7, 8(1)(c), 126, 130, 131 of the Treaty, Articles 1(2), 7, 13, 26, 62, 65, 66 of the Charter; and Articles 5(3) and 34(6) of the Protocol.
13. In addition, the Appellant contended that the First Instance Division erred in law when it held that the 2nd, 3rd and 5th Respondents had no obligation to a time frame to expeditiously deposit declarations under Articles 5(3) and 34(6) of the Protocol to allow their individual citizens and NGO's to have access to the African Court of Human and Peoples' Rights (" the African Court").The Appellant further, contended that all the EAC Partner States have signed, ratified, or acceded to the

Treaty and have thereby undertaken to be governed in accordance with Article 6 (d) of the Treaty which obliges every EAC Partner State to promote and protect "human rights in accordance with the provisions of the Charter."

14. The Appellant went further to mention the requirement of Article 126 of the Treaty under which, all Partner States are enjoined to cooperate in legal and judicial affairs; to harmonize their national laws which appertain to the Community; and, under Articles 130 and 131 of the Treaty, to honor their commitments under the Treaty in respect of multinational and international organizations especially the African Union and the United Nations.
15. The Appellant relied on the Vienna Convention under which, a Partner State cannot invoke its own internal laws to defend its failure to comply with its international obligations. According to him, the failure, delay or neglect of the 2nd, 3rd, and 5th Respondents to deposit the declarations under Articles 5 (3) and 34 (6) of the Protocol to the Charter is not justifiable since they have already ratified the said Protocol; and, by ratification, they have expressed their consent to be bound by the provisions of the Protocol.To that end, the Appellant averred that in accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties, the Partner States are bound to refrain from acts which would defeat the object and purpose of the Treaty.
16. The Appellant submitted therefore that when a State ratifies any of the international Human rights treaties, it assumes a legal obligation to implement the rights recognized in that Treaty; in the sense that, through ratification, the Partner States undertake to put in place domestic measures and legislation compatible with their Treaty obligations.

    Issue No.3. Whether the First Instance Division erred in law when it held that the 1st Respondent had no duty under the EAC Treaty to supervise the 2nd, 3rd and 5th Respondents to comply with their obligations under the Charter, the Protocol, and under the Vienna Convention.
17. The Appellant submitted that indeed, the First Instance Division erred in law when it held that the 1st had no duty under Articles 29 of the Treaty, 67 and 71 of the Treaty to ensure that the 2nd, 3rd, and 5th Respondents comply with the provisions of Articles 5, 6, 7(2), 126, 130, and 131 of the Treaty, and Articles 5(3) and 34(6) of the Protocol; and that, therefore, Reference No. 2 of 2012 disclosed no cause of action against the 1st Respondent.
18. Furthermore, the Appellant submitted that the 1st Respondent being the Chief Executive Officer of the East African Community ("the Community"), is mandated to play a supervisory role over the Partner States to ensure that the Partner States comply with the provisions of the Treaty. He contended that it is a duty under Articles 29 and 71 of the Treaty to carry out investigations, collect information,and verify matters that are brought to his attention, and, ensure that the Partner States comply with the Provisions of the Treaty.
19. The Appellant further contended that the 1st Respondent failed to supervise the 2nd, 3rd, and 5th Respondents to ensure that they deposit their declarations pursuant to the provisions of the Protocol to the African Charter despite having been informed about it.

20. As to the issue of the cause of action, the Appellant argued that a complaint on the infringement of Treaty obligations under Articles 5,6,8,23,27 and 30 of the EAC Treaty creates a cause of action under the Treaty. In support of his argument in that respect, the Appellant cited various cases of this Court such as *Katabazi & Another V. Secretary General of the East African Community & 4 Others AHRLR 119 (EACJ 2007), Callist Mwatela & Others V. Secretary General of the East African Community (EACJ 2008) Reference No.1 of 2005, Prof. Anyang' Nyongo & 10 Others v. AG Kenya & Others EACJ Ref No.1 of 2006*.
    Issue No.4. Whether the First Instance Division erred in law when it refused to award costs against the 1st, 2nd, 3rd and 5th Respondents in the circumstances.
21. This issue is dealt with in Paragraph 81 of this Judgment.

**The Respondents' Case**

**The 1st Respondent's Submissions**

22. On the first issue, regarding jurisdiction, the 1st Respondent submitted that the First Instance Division of the Court correctly held that the right forum for litigating over the said matter was the African Court through the African Commission. Therefore, according to him, the First Instance Division was right to decline to interpret Articles 1(2), 7, 13,26,62,65 and 66 of the Charter and Articles 1, 3, 5 and 34 of the Protocol.
23. As regards the 2nd issue, relating to the alleged delay to deposit the declaration under Articles 5 (3) and 34 (6) of the Protocol, the 1st Respondent submitted that Article 34 (6) of the Protocol does not prescribe any deadline for depositing declarations. Therefore, there was no violation occasioned. Under that Article, discretion is left to each State Party as to the timing of the deposit of its declaration.
24. He distinguished this case from the *Katabazi case (supra)* to the extent that the delay in depositing a declaration does not in any way constitute a violation of any provision of the Treaty.
25. The 1st Respondent concluded on that issue by contending that the case of *Katabazi (supra)* cited by the Appellant is not applicable in the instant case
26. With regard to the 3rd issue, namely, whether the 1st Respondent had no duty under the Treaty to supervise the Respondents to comply with their obligations under the Charter, the Protocol, and the Vienna Convention, the 1st Respondent submitted, among others, that under Article 29(1) of the Treaty, the Secretary General has a margin of appreciation. To be moved under that Article, he must be convinced that a Partner State has failed to fulfill an obligation under the Treaty or has infringed a provision of the Treaty. The 1st Respondent concluded that a delay to deposit a declaration when there is no constraining time limit to do so, cannot constitute a violation of Articles 5(3) and 34(6) of the Protocol; nor indeed, of any of the enumerated provisions of the Charter, or of the Treaty.
27. On issue No.5 namely, of whether the Appellant was entitled to the remedies sought, the 1st Respondent submitted that in light of the various laws cited above and by the foregoing submissions, the Appellant is not entitled to any of the prayers sought; that therefore, this Appeal be dismissed with costs to the 1st Respondent.

**The 2nd Respondent's Submissions**

28. As regards the 1st Issue, Counsel for the 2nd Respondent was in agreement with the Findings of the First Instance Division. He submitted that the instant Reference presented two legal regimes namely, the EAC Treaty; as well as the Charter and the Protocol. Counsel observed that both regimes create institutional mechanisms through which redress can be sought in case of infringement of the Treaty on one hand, or of the Charter or the Protocol, on the other hand.
29. Counsel added that the institutions created under the two legal regimes are not seized with parallel jurisdiction to handle infringements arising out of other instruments which have their own mechanisms to handle disputes referred to them.
30. Counsel submitted that the Appellant has not presented any evidence before this Court to demonstrate that the East African Court of Justice has concurrent jurisdiction with the African Court and African Commission.
31. Counsel challenged the authorities of the Court's jurisprudence relied upon by the Appellant to support the view that the Court has jurisdiction. Counsel contended that these authorities are inapplicable. They do not suggest that the EACJ has jurisdiction to interpret and apply the provisions of the African Charter.
32. Counsel submitted that Article 5(3) of the Protocol is silent as to the time within which a State Party must deposit a declaration. He, therefore, agrees entirely with the Findings and Decision of the First Instance Division.
33. Regarding the remedies sought, Counsel invited the Court to dismiss the Appeal with costs to the 2nd Respondent.

**The 3rd Respondent's Submissions**

34. As regards the 1st issue, the 3rd Respondent's answer was an emphatic "No". Pursuant to Articles 9, 23, 27 of the Treaty, Counsel for the 3rd Respondent submitted that the Court is a creature of the Treaty. The Appellant bears the burden to demonstrate that the Court has legally assumed a specific jurisdiction to interpret the
35. On the alleged delay by the 2nd, 3rd, and 5th Respondents to deposit their declarations, Counsel submitted that a delay cannot be established unless if it is measurable against some continuum stipulated in the Charter. Where, as here, the delay cannot be measured, it is not possible to found a claim for violation of the rights of the Applicant, (now the Appellant).Counsel concluded that violations of the Charter are triable under the Charter itself.
36. On the supervisory role of the Secretary General of the East African Community, Counsel for the 3rd Respondent contended that the case of *Katabazi (supra)* cited by the Appellant is distinguishable on the basis of interpretation of Article 71 of the Treaty. Counsel concluded that that case, therefore, was not applicable to the circumstances of the instant Reference.
37. Accordingly, Counsel urged the Court to dismiss the Appeal, with costs to all the Respondents.

**The 4th Respondent's Submission.**

38. On the issue of jurisdiction, Counsel for the 4th Respondent submitted that the First Instance Division arrived at a proper decision by holding that it had no

jurisdiction to interpret the Charter and the Protocol. In so doing, the Court read Article 23 of the Treaty in conjunction with Article 27 (1).

39. Counsel contended that the Treaty provisions cited above made it clear that the East African Court of Justice can only interpret the Treaty and not the other international Conventions.
40. As to the alleged delay by the Respondents to deposit their declarations as per the provisions of the Protocol, the 4th Respondent submitted that even if, for argument's sake, the Protocol were held to enjoin the State Parties to make declarations within a specific time; and thus, not doing so occasioned a violation of the Charter and the Protocol, the East African Court would not be the proper forum to provide redress. The right forum would the African Court pursuant to Article 3 of the Protocol, and to Rule 26 of the African Court's Rules of Procedure.
41. Accordingly, the 4th Respondent prayed this Court to dismiss the Appeal against the 4th Respondent with costs; and to make such other orders as it deems fit.

**The Court's Analysis of the Issues**

We will deal with Issues No.1 and No.2 together. The two are inter-related- namely: (1) Whether the First Instance Division erred in law when it held that it had no jurisdiction to interpret the African Charter, the Protocol, and other relevant international conventions and instruments to which the 2nd ,3rd and 5th Respondents are parties; and Whether the First Instance Division erred in law when it held that the delay by the 2nd , 3rd and 5th Respondents in depositing their respective declarations was not a violation of the provisions of the Treaty, and of the Charter, the Protocol; and the Vienna Convention.

42. The above two issues involve mainly the concept of Jurisdiction. Its meaning needs to be ascertained first in order to apply it correctly.
In *Shabtai Rosenne'S: "The Law and Practice of the International Court," 1920 – 2005 Vol. II p.524, it is postulated that "jurisdiction relates to the capacity of the Court to decide a particular case with final and binding force*."
43. In the *Nottebohm* (cited in the *Law and Practice of International Court*. p. 523), it was observed that the Court must determine the scope of the relevant title of jurisdiction.
44. It is evident that jurisdiction refers to the boundary of authority. It is critical concept which, any court of law has to deal with carefully and in accordance with the established legal principles in order to ensure that the court's findings or decision will have legal and binding effect on the parties.
45. The jurisdiction of the East African Court of Justice can be traced from the following provisions of the Treaty – namely, Articles 23 (role of the Court), 27(jurisdiction of the Court), 28 (Reference by Partner States), 29(Reference by Secretary General), 30 (Reference by Legal and Natural persons), 31 (Disputes between the Community and its employees), 32 (Arbitration clauses and Special Agreements), 34 (Preliminary Ruling of National Courts), 35A (Appeals from the First Instance Division), 36 (Advisory opinion),39 (Interim orders), 42 (Rules of the Court) and 45(2) ( employment of staff). These are discussed in detail in the case of *Independent Medical Legal Unit vs. Attorney General of the Republic of Kenya EACJ Appeal No.1 of 2011*).
46. The primary provision, on which the jurisdiction of the East African Court of Justice

is founded, is Article 23 of the Treaty. it provides, in relevant part, 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"

47. The above Article should be read together with Article 27 of the Treaty, which provides that:-

"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 operationalize the extended jurisdiction."

48. In view of the above, it is obvious that once a matter involves the interpretation and application of the provisions of the Treaty, such matter falls ipso jure within the jurisdiction of the East African Court of Justice (*jurisdiction ratione materiae*, namely, jurisdiction over the nature of the case and the type of relief sought).

49. Another test to meet in the assessment of the jurisdiction of the East African Court of Justice is found under Article 30 of the Treaty which provides for the *jurisdiction ratione materiae, jurisdiction ratione persona* (i.e. persons/litigants) and *jurisdiction ratione temporis* (i.e. territory) as follows:-

"1. Subject to the provision of Article 27 of this Treaty, any person who is a 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 Treaty"

2. The proceeding provided for under 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;

3. 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".

4. The above quotation of Article 27 of the Treaty shows that:

(1) the initial jurisdiction of the Court is confined to the interpretation, and application of the Treaty, and

(2) the subsequent extended jurisdiction of the Court will include original, appellate, human rights and other matters.

50. In *Shabtai Rosenne's:* T*he Law and Practice of the International Court, [supra]*, it was observed that:-

"…In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court. For that purpose, the Court allows preliminary objection procedure to be employed for several different types of disputes as to whether the Court has jurisdiction…..The matter can also arise and be decided at any stage of a case, in quality of 'a plea".

51. For the instant Appeal, it is apt to recall that in the First Instance Division, the Appellant was mainly challenging the 2nd, 3rd, 4th and 5th Respondents' failure or delay to make their respective declarations to accept the jurisdiction of the African Court in line with Articles 5(3) and 34(6) of the Protocol. This, he contended, was an infringement of both the Treaty and of the Charter; as well as a contravention of the provisions of the Vienna Convention.
52. In this regard, Article 34 (6) of the Protocol provides as follows:-
"At the time of the ratification of this Protocol or any time thereafter, the State [Party] shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol. The Court shall not receive any petition under Article 5(3) involving a State Party which has not made such a declaration."
53. Article 5(3) of the Protocol to which the above Article 34 (6) of the Charter makes reference, provides as follows:-
"3.The Court may entitle relevant non-Governmental Organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with Article 34(6) of the Protocol"
54. The above cited Article 34 of the Protocol does not set any specific time limit within which a State Party must deposit its declaration. The wording "… or any time thereafter…", far from stipulating a concrete deadline, provides instead a margin of discretion within which a State Parties may deposit their declarations. Therefore, a State Party which has not yet deposited the said declaration cannot be faulted under the above provision.
55. The question is whether, in light of the above, the nature of the Appellant's case had matters triable under the provisions of the Treaty, especially under Articles 6,7,27 and 30 of the Treaty? The answer is in affirmative. Indeed, that was also the finding of the First Instance Division.
56. Article 6(d) of the Treaty obligates the Partner States to adhere to the principles of democracy, the rule of law, accountability, transparency, social justice, …….. as well as recognition, promotion and protection of Human and Peoples' Rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.
57. The wording "…in accordance with the provisions of the African Charter on Human and Peoples' Rights", creates an obligation on the EAC Partner States to act in good faith and in accordance with the provisions of the Charter. Failure to do so constitutes an infringement of the Treaty. Such violation can be legally challenged before the East African Court of Justice by virtue of its jurisdiction *ratione materiae*, which is provided for especially under Article 23 read together with Article 27 of the Treaty.
58. In the *Chorzow Factory* (*Jurisdiction case page 519 (supra)* the Permanent Court of international Justice established an important [general] principle namely that:
"The Court when it has to define its jurisdiction in relation to that of another international tribunal cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of denial of justice."
59. The Respondents argued that the First Instance Division cannot purport to operate outside the framework of the Treaty and usurp the powers of other international courts established for the enforcement of obligations created by other international

instruments, including the African Charter and its Protocol.

60. We have indicated above that Article 6(d) of the Treaty; which sets out the Fundamental Principles of the Community, obliges the Partner States to take into account and observe the provisions of the Charter concerning, the protection and promotion of human and peoples' rights.
61. The same obligation is emphasized by Article 7(2) of the Treaty which in stipulating the Operational Principles of the Community, provides that:-
"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."
62. Articles 6 (d) and 7(2) of the Treaty empower the East African Court of Justice to apply the provisions of the Charter, the Vienna Convention, as well as any other relevant international instrument to ensure the Partner States' observance of the provisions of the Treaty, as well as those of other international instruments to which the Treaty makes reference. The role of the Court in the instant Reference, was to ascertain the Partner States' adherence to, observance of, and/or compliance with the Treaty provisions – including the provisions of any other international instruments which are incorporated in the Treaty, whether explicitly [as in Article 6(d)], or implicitly [as in Article 7 (2)].
63. The above reasoning has been reiterated in several decisions of this Court. In *The Attorney General of the Republic of Rwanda V Plaxeda Rugumba, EACJ Appeal No.1 of 2012* the Court reaffirmed its jurisdiction to interpret and to apply the provisions of the Treaty, including its Article 6 (d), 7(2) and 8 (1) (c). It held that failure by the authorities in Rwanda to charge Lt. Col. Seveline Rugigana Ngabo with specific offences for 5 months, was fundamentally inconsistent with Rwanda's express undertakings under Articles 6(d), 7(2) and 8(1)(c) of the Treaty to observe the principles of good governance, including in particular, the principle of adherence to the rule of law, and the promotion and protection of human rights. These failures, singly and collectively, constituted an infringement of the said provisions of the Treaty, (see also, the case of *James Katabazi (supra)*.
64. Briefly, then, nothing can preclude the East African Court of Justice from referring to the relevant provisions of the Charter, its Protocol and the Vienna Convention on the Law of Treaties in order to interpret the Treaty. In as far as the Articles quoted above especially Article 6(d) recognize the Charter's relevance in promotion and protection of human and peoples' rights, then compliance with those provisions of the Charter become, *ipso jure*, an obligation imposed upon the Partner States under the Treaty.
65. On other hand, as regards the application by this Court of the provisions of the Vienna Convention, it would be simply illogical -- if not downright absurd – for this Court which is (itself a creature of a Treaty, and whose very raison d'être is the interpretation of that Treaty), to be barred from applying the provisions of the Vienna Convention. In this connection, we need only refer to two of the Articles of that Convention for an authoritative statement in the matter, namely Article 31 and Article 32(b). Those Articles prescribes the primary canons of construction for interpretation of treaties, and the supplementary means of such interpretation.
66. We are, therefore, of the view that the East African Court of Justice has the jurisdiction

to interpret the Charter in the context of the Treaty. Consequently, the Appellant succeeds on Issue No.1.

67. We reiterate what we said above, that the wording of the Protocol, and particularly so the phrase "… or any time thereafter…" in Article 34 (6) of that Protocol, allows an elastic margin of discretion within which State Parties may deposit their declarations. It does not provide for any constraining time frame beyond which a State Party which has not yet deposited its declaration can be said to have violated the Protocol. In the result, we find no violation of the Charter, or of the Protocol; nor indeed, of any of the enumerated provisions relied upon by the Appellant.
    Accordingly, the Appellant fails on of Issue No.2.
    Issue No.3: Whether the First Instance Division erred in law when it held that the 1st Respondent had no duty under the EAC Treaty to supervise the 2nd, 3rd and 5th Respondents to comply with their obligations under the Charter, the Protocol, and the Vienna Convention.
68. The Secretary General's supervisory role is articulated in Article 29(1) of the Treaty. It provides that:-
    "1. Where the Secretary General considers that a Partner State has failed to fulfil 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;"
    In the *Katabazi case (supra)*, it was observed that:-
    "....the above provision requires the Secretary General to "submit his or her findings to the Partner State concerned and that [and] ...there is nothing to prohibit the Secretary General from conducting an investigation on his/her own initiative...".
69. We do subscribe to the above reasoning that the Secretary General can act, on his own initiative when there are allegations of violation of the Treaty, or when he or she considers that a Partner State has failed to fulfil an obligation under the Treaty. In this case, the Secretary General indicated that, once he got information of the Appellant's complaint, he wrote to all Respondents seeking a clarification on the matter. Once the Reference was filed, he left the matter in the Court's hands. The First Instance Division found that in the circumstances of this Reference, the Secretary General could not have done more. We agree with that conclusion of the First Instance Division.
70. Accordingly, the Appellant fails on Issue No.3.
    Issue No.4: whether the First Instance Division erred in law when it refused to award costs against the 1st, 2nd, 3rd, and 5th Respondents in the circumstances.
    We remind ourselves that at the Scheduling Conference of the Appellate Division, the Appellant abandoned the issue of costs against the Republic of Rwanda, which had deposited its declaration while the Reference was still pending before the First Instance Division. Nonetheless, the Appellant still maintains his prayer for costs against the 1st, 2nd, 3rd and 5th Respondents which have not yet made their declarations.
    In view of our findings, we see no reason to award costs in this Appeal. On the contrary, we associate ourselves with the First Instance Division's finding that the case, being one of great public interest, would be inappropriate to order any Party to pay the costs of the other.
    Issue No.5: Whether the Appellant is entitled to the remedies sought.

71. In its prayer for reliefs, the Appellant sought this Court to make the following orders, namely, that the Court:-
    (i) uphold the First Instance Division's holding that this Court has jurisdiction to ensure adherence to the law in the interpretation, application and compliance with the EAC Treaty;
    (ii) set aside the First Instance Division's holding that this Court has no jurisdiction to ensure adherence to the provisions of the African Charter and its Protocol;
    (iii) set aside the First Instance Division's finding that Appellant's Reference did not disclose a cause of action against the First Respondent be set aside;
    (iv) set aside the First Instance Division's order dismissing the Appellant's case against the 1st, 2nd, 3rd and 5th Respondents regarding the delay to deposit their relevant declarations under the Protocol to the African Charter on Human and Peoples' Rights;
    (v) set aside the First Instance Division's holding that the 1st Respondent's failure to carry out his supervisory role over all the Partner States of the East African Community was not a contravention of the Treaty;
    (vi) set aside the First Instance Division's, holding that neither the Secretary General (1st Respondent), nor the EACJ can compel the Republics of Uganda, Kenya and Burundi (the 2nd, 3rd and 5th Respondents, respectively) to deposit their respective declarations; and
    (vii) allow the Appeal.
72. In view of our findings on the specific issues that were before this Court, we grant the Order sought by the Appellant in the above sub-paragraph (ii) of paragraph 79. The prayer in sub-paragraph (i) of paragraph 79 above, raises no particular dispute requiring any order from this Court.
73. The Orders prayed for in sub-paragraphs (iii), (iv), (v) and (vii) of paragraph 79 are refused.

**Conclusion**

74. In view of all the above findings and reasons:
    (a) The Appeal is dismissed, save as otherwise indicated in paragraph 80 of this Judgment.
    (b) Each Party shall bear its own costs, both in this Division and in the First Instance Division.

It is so ordered.

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East African Court of Justice – Appellate Division
Appeal No.3 of 2014

Appeal from part of the Judgment in Reference No. 9 of 2010 of the First Instance Division: Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; and John Mkwawa, J; dated 20th June, 2014

**The Attorney General of the United Republic of Tanzania And African Network for Animal Welfare**

Before: E. Ugirashebuja, P; L.Nkurunziza VP; J. Ogoola JA; E. Rutakangwa, JA; A.Ringera JA
July 29, 2015

*Commencement of Treaties - Co-operation on natural resources and environment - Grant of a Permanent Injunction against a sovereign Parner State - Inherent unfettered jurisdiction - Pending Protocols – Trans-boundary environmental impact - Treaty obligations - Threshold for a justiciable action - Tangible actions compared to mere proposals- Whether the Trial Court erred in entertaining a Reference based on a proposal.*

*Articles: 5(3) (c), 8(1) (c), 23(1), 27(2), 30, 111(2), 114(1), 139, 140(6), 151(1), 153, of the EAC Treaty - Rule 1(2) of the EACJ's Rules of Procedure, 2013*

The Applicant /Respondent, a charitable animal welfare organisation filed Reference No 9 of 2010 seeking *inter alia* orders permanently restraining the Appellant / Respondent from upgrading the Natta-Mugumu – Kleins Gate Loliondo Road averring that this would irreversibly damage the ecosystem of the Serengeti National Park and adjoining parks including Masai Mara national park in Kenya. The Appellant/ Respondent on their part contented that; the upgrade would stimulate socio-economic growth for over two million citizens and reduce transport costs between Mugumu and Loliondo; that any negative environmental impacts would be mitigated with the guidance of environmental expertise; and that the Reference was untenable in law as it sought to enforce a part of the Treaty which had not been operationalised through the conclusion of a Protocol on environment and natural resources.

On 20th June, 2014, the First Instance Division 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 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. Being aggrieved by this decisions the Appellant filed this appeal.

**Held:**

1) There can be no fetter against the Court's carrying out its duty to interpret the provisions of the Treaty and to ensure that Partner States adhere to and live by the objectives, duties, undertakings and standards which they, as full-fledged Sovereign States, directly, deliberately, freely and voluntarily assumed under the Treaty.
2) The omission to conclude a Protocol on the Environment and Natural Resources had nothing to do with the capacity of the Court to interpret the existing provisions of the Treaty. The Court's function to apply the provisions of the Treaty cannot be deterred by the absence of a Protocol.
3) The Trial Court committed no error in enforcing Chapter Nineteen of the Treaty, pending the conclusion of any Protocol for the Partner States' co-operation on Natural Resources and the Environment.
4) The Trial Court never took into account any alleged violations of the International Conventions and Declarations.
   However, by being signatories to these other International Conventions and Declarations, the EAC Partner States, subscribed to the various standards, norms and values of those Conventions.
5) The Court was expressly created to be a judicial body clothed with all the attributes, powers, authority and stature ordinarily vested in similar judicial bodies.
6) It was incumbent upon the Trial Court to assure itself that it was dealing with a real live dispute before it – and not a mere abstract proposition or theoretical hypothesis for constructing a road whose only tangible "action" was the Government's commissioning of a feasibility study. The action must constitute more than a mere abstract idea, hypothetical plan, or academic postulate, or a dreamer's wish on the part of the potential actor. Thus, the Appellant succeeded on this issue as the Trial Court erred in law by entertaining the Reference based on a proposal.
7) The Trial Court did not err in granting an injunction to restrain the United Republic of Tanzania from ever implementing its proposal to construct the Serengeti Super Highway as "initially planned". The grant of the injunction was proper and justified – given the imminent risk of irreversible damage inherent in any attempt to implement the "initial plan." The "action" must constitute more than a mere abstract idea, hypothetical plan, or academic postulate, or a dreamer's wish on the part of the potential actor. The power of the Court to grant permanent injunctions was upheld.

**Cases cited:**

Aetna Life Ins. Co. v. Haworth, 300 US 227

Alcon International Ltd v. Standard Chartered Bank of Uganda, et el, EACJ Appeal No. 3 of 2013

Alhaji Yar'adua & Anor. v. Alhaji Abubakar & Others, Nigeria Weekly Reports, SC 274/2007

Alwi A. Saggaf v. Abedi Ali Algeredi [1961] EA 767

Attorney General of Kenya v Independent Medical Legal Unit, [EACJ Appeal No1of 2011

C. D. Olale vs. G.O. Ekwelendu, [1989] LPELER – SC, 54/1988

Ex Parte Firth [1882] 19 Ch. Div.419

Legal Brains Trust (LBT) v. Attorney General of Uganda, EACJ Appeal No. 4 of 2012

Marbury vs. Madison; Steel Co. aka Chicago Steel & Picking Co. v. Citizens for a Better Environment, 532 US 83 (1998)
Muskrat v. US, 219 US 346(1911)
North Staffordshire Railway Co. v. Edge (1920) AC 254
Re Pacific R. Commission, 32 Fed. 241, 225 (US Supreme Court)
Robards v. Insurance Officer, Case 149/82 [1983] ECR 171
Societe d' Importation Edouard Leclerc-Siplec v. TFI Publicite' SA and M6 SA [Case C – 412/93, European Court Reports 1995, p. I-00179]
Tanganyika Farmers Association Ltd v. Unyamwezi Development Corporation Ltd [1960] EA 620
The Tasmania [1890] AC 223

**Judgment**

**Introduction**

1. This is an Appeal brought before this Appellate Division of the East African Court of Justice (EACJ) by the Attorney General of the United Republic of Tanzania (the "Appellant") against the Judgment of the First Instance Division of this Court ("the Trial Court"), which the African Network for Animal Welfare ("ANAW" or the "Respondent"), won; but with which the Appellant (then, the Respondent) was aggrieved.
2. At the heart of this Reference (the first of its kind in this Regional Court), was the delicate and precarious balance; pitting the aspirations of the State for accelerated socio-economic development of the Country, against the concerns of the Civil Society for the conservation, preservation and protection of the Natural Environment. At the centre of this epic battle, was the fate of the iconic Serengeti Nature Reserve, straddling the International borders of Kenya and Tanzania.
3. As stated above, the Appeal arises from the Judgment of the Trial Court dated 20th June 2014. In his Memorandum of Appeal dated 25th August, 2014, the Appellant canvassed the following four grounds of appeal:-
   "1. That the first Instance Court erred in law and fact in entertaining the reference based on a mere proposal to upgrade the road which in law was incapable of being challenging (sic) in the Court of Law.
   2. That the first instance Court erred in law and fact by holding that it is proper to enforce Article111-114 of the East African Treaty which is yet to be negotiated, agreed, signed and ratified by all East African countries.
   3. That the first instance Court erred in law by holding that, it has jurisdiction to entertain dispute (sic) of the alleged violation of international Conventions and Declarations regardless the same (sic) having specific forum to enforce the dispute emanating from those conventions or Declarations.
   4. That the First instance Court erred in law by holding that it has power to grant permanent injunction against any of the partner state(sic) under the Treaty."
4. In the same Memorandum of Appeal, the Appellant prayed this Court to order:-
   (iv) that the Judgment of the Trial Court be set aside;
   (v) that the Appeal be allowed with costs; and

(vi) make any other orders which this Court deems just and equitable.

5. On 8th October, 2014, at the Scheduling Conference of this Appeal, it was agreed to constitute the above four grounds of appeal (with minor modifications of language) into the Four Agreed Issues for the consideration of this Appellate Division. Additionally, a fifth issue was included to read as follows:-
"(v) Whether the Parties are entitled to the remedies sought?."
6. At the same Scheduling Conference, Counsel for both Parties agreed to make written submissions, which they would then briefly highlight at the oral hearing of the matter on a date to be notified by the Court.

**The Appellant's Submissions**

7. Learned Principal State Attorney, Mr. Gabriel Pascal Malata, representing the Appellant, took the following stands on each of the above Agreed Issues:-
(iv) Whether the Trial Court erred in law in entertaining a "Mere Proposal"?
8. In his view, there was neither Tanzania Government decision nor action capable of being challenged before a court of law. All there was, was a mere proposal. Therefore, the Trial Court erred in entertaining a "mere proposal, a mental idea which was yet to be decided …. [after] the outcome of the feasibility study conducted by M/S Inter-consult Ltd. to see if the idea to have such a project would be visible or not given the environmental impact assessment gathered by the above Consultant."
(v) Whether the Trial Court erred in law in enforcing Articles 111-114 of the EAC Treaty?
9. Learned Counsel Malata contended that in the absence of the Protocol required under Article 151 of the EAC Treaty to "operationalize" Articles 111-114 of the Treaty (regulating Environmental matters), those Articles have not yet been implemented and cannot, therefore, be enforced. Accordingly, it was improper for the Trial Court to entertain them.
(vi) Whether the Trial Court erred in considering International Environmental Conventions as a basis for resolving the instant dispute?
10. Mr. Malata found error and impropriety in the Trial Court's recourse to the standards and principles established by various International Environmental Conventions and Declarations, as a basis for resolving the instant EAC-based dispute.
11. In his view, the Conventions and Declarations have their own separate mechanisms and fora for dispute resolution. Moreover, only States (not private persons such as ANAW) are allowed *locus standi* under the provisions of those Conventions and Declarations.
(vii) Whether the Trial Court erred in law in granting a Permanent Injunction against a Sovereign State?
12. Counsel contended that the Trial Court had no powers to grant a permanent injunction (which is absolute in nature) under the EAC Treaty – nor, indeed under "*UNESCO Convention or Declaration, or African Convention or Declaration*." To that extent, the Trial Court violated Articles 5(3) (c), 8(1) (c), 111(2) and 114(1) of the EAC Treaty.

**The Respondent's Submissions**

13. Learned Counsel, Mr. Kanchory Mbalela Saitabao (appearing for the Respondent) answered the Appellant's above contentions, issue by issue, as follows:-
    (i) Whether the Trial Court erred in law in entertaining a "Mere Proposal"?
14. The Appellant's contention is belated; is not supported by the evidence on the record; and was never raised or canvassed in the original pleadings. It should not be raised now, on appeal. In any event, the Trial Court found as a matter of fact that there was, indeed, a decision to upgrade the disputed part of the road to bitumen standard and to open the same to public use – which decision was subsequently reviewed following the concerns of, among others, UNESCO. In summary, Counsel characterized the Appellant's contentions as a matter of mere "semantics".
    (ii) Whether the Trial Court erred in law in enforcing Articles 111-114 of the EAC Treaty?:
15. Mr. Saitabao stressed that the Appellant's contention on this issue was res judicata, given the earlier Judgment of the Appellate Division of this Court, dated 15th March, 2012, wherein this Court firmly and categorically established its jurisdiction to entertain environmental matters. The Court affirmed that the jurisdiction in question derives from Articles 5(2) & (3)(c); 8(1)(c); 111(1)(b) & (d) 112(1); and 114(1) of the EAC Treaty. Accordingly, the learned Counsel contended "it is worrying if not simply absurd" for the Appellant to argue that Articles 111 to 114 of the EAC Treaty are "….. yet to be negotiated, agreed, signed and ratified by all the East African Countries and are therefore, currently unenforceable."
    (iii) Whether the Trial Court erred in considering International Environmental Conventions as a basis for resolving the instant dispute?:
16. Counsel Saitabao's submission on this issue was quite simple – namely, that the Trial Court "DID NOT take into account the International Instruments cited in arriving at its findings", as alleged by the Appellant. Indeed, the Trial Court grounded its Judgment "not [on] the alleged violations of the cited International Declarations and Conventions per se, but [on] infringement of Chapter Ninenteen of the [EAC] Treaty…"
    (iv) Whether the Trial Court erred in Law in granting a Permanent Injunction against a Sovereign State?:
17. On this, Counsel Saitabao found ample authority in the EAC Treaty for this Court to grant permanent injunctions – namely, Article 23(1) empowering the Court to issue such order(s) as may be necessary to achieve the Court's principal role of ensuring adherence to the law in its interpretation and application of, and compliance with, the Treaty. Additionally, the Court has inherent jurisdiction under Rule 1(2) of its own Rules of Procedure, to grant such orders and reliefs as are ordinarily granted by courts of law "to meet the ends of justice". Likewise, Counsel relied on Article 39 of the Treaty and Rule 21 of the Court's Rules of Procedure to find authority for the Court's issuance of interim orders as well as, necessarily, permanent injunctions.
18. On Issue No.5 (the Available Reliefs to the Parties), Counsel for both Parties said little, if anything – leaving it all to the Court's discretion.

**The Court's Analysis of The Issues**

Issue No.2: Whether the Trial Court Erred in Law in Enforcing Articles 111-114 of the EAC Treaty When those Articles are yet to be Negotiated, Agreed, Signed and Ratified by all Partner States, through an Appropriate Protocol?

19. In his written submissions, Counsel for the Appellant clarified that:-
"It is undisputed that the East African Community Treaty is in place, however, the implementation of a number of objectives and Chapters of the Treaty are yet to be enforced as the same are still waiting for the Partner States to legalize, agree and ratify the same through Protocol."
20. In Counsel's understanding, these Chapters and Provisions (notably, Chapter Ninenteen: Articles 111 through 114) of the Treaty, remain dormant (i.e. unimplemented and unimplementable), until the Partner States negotiate, agree, sign and ratify the operationalizing Protocol envisaged under Article 151 of the Treaty. It is such a Protocol that would spell out the objectives, scope and mechanisms required in this environmental area of State cooperation. In this regard, learned Counsel conceded that:-
"…..if the Partner States have agreed to conclude a Protocol on some of the areas of co-operation under the Treaty, then that part of the Treaty shall not be operative until the Protocol has been signed and ratified by all Partner States."
21. In reply, Learned Counsel for the Respondent raised a number of points. First and at the outset, Counsel contended that enforceability of Chapter Ninenteen (Articles 111-114) of the EAC Treaty is *res judicata*, as "this self-same matter between the same Parties herein [were litigated and determined in] the Judgment of [this Appellate Division of ] the Court dated 15th March, 2012" in an earlier Interlocutory Appeal (No.3 of 2011).
22. We agree. Indeed, our Judgment in Appeal No.3 of 2011 did clearly and categorically state that:-
"It is quite evident that all the provisions of Articles 5(3)(c); 8(1)(c); 111(1) (b)& (d), 111(1) & (2); and 114(1) impose on the Partner States one obligation or another; one duty or another; and one undertaking or another with regard to their mutual cooperation 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 (namely, the United Republic of Tanzania) has or has not complied with its obligations under each and everyone of those Treaty Provisions."
23. Implicit in the above quoted language of our Judgment of 15th March, 2012, are two critical concepts: One, all those provisions of the Treaty (Articles 5(3)(c ) through 114(1), are live and vibrant provisions of the Treaty, capable of being interpreted and applied by the Court, pursuant to the Court's primary role of interpretation and application under Article 27(1), as well as being implemented and enforced under the Court's duty to ensure compliance with the provisions of the Treaty under Article 23(1). There can be no bar or fetter whatsoever against the Court's carrying out its duty to interpret the provisions of the Treaty; apply them; and ensure that Partner States adhere to and live by the objectives, duties, undertakings and standards which they, as full-fledged Sovereign States, did directly, deliberately, freely and voluntarily

assume under the provisions of their Treaty – a Treaty which, even Counsel for the Appellant readily admits, was negotiated, signed and duly ratified by all the Partner States.

24. The omission to conclude a Protocol on the Environment and Natural Resources has nothing to do with the capacity of the Court to interpret the existing provisions of the Treaty – inasmuch as interpretation under Article 27(1) entails the declaration of what obligations, undertakings, standards and duties, contained in those provisions, bind the Partner States. Similarly, the Court's function to apply the provisions of the Treaty cannot be deterred by the absence of a Protocol – inasmuch as application under Article 27(1) entails the judicial pronouncement as to whether or not particular provisions of the Treaty apply to a particular Party or to a given set of circumstances.
25. The second concept, implicit in the above quoted position of our Judgment of 15th March, 2012, was the notion that Articles 111 through 114 of the EAC Treaty are self-executing provisions – requiring no special act, process, proceeding, or procedure to operationalize them (i.e. to breathe into them the breath of legislative life to make them "*alive*"). No; not at all. They live by the mere fact of their existence as an integral part of a Treaty, whose provisions have "come into force", without a reservation, caveat or similar kind of condition (see Paragraphs 29 through 31 below). Indeed, Articles 111 through 114 are some of the provisions in the Treaty which create special causes of action. This special attribute is, in itself, clear testimony that these provisions are wholly and truly implementable and enforceable in their current state. In this connection, this Appellate Division, in the same *Appeal No.3 of 2011 (supra)*, did explain as follows:-

    "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 vs. Attorney General of Kenya & 5 Others (EACJ Reference No.1 of 2006, Judgment of 30th March, 2007*) on special causes of action created by EAC Treaty."
26. The Appellant raised yet another objection, namely that:-

    "It is a legal position under the Treaty ---- that if the Partner States have agreed to conclude Protocol (sic) on some of the areas of cooperation under the Treaty, then that part of the Treaty shall not be operative until the Protocol has been signed and ratified by all Partner States."
27. The Appellant's above quoted position begs the question of what is a Protocol, at any rate under the regime of the East African Community Treaty. A critical consideration here is this; if, as the Appellant contends, the provisions of the Treaty themselves are inoperative, then on what base or foundation would an envisaged Protocol stand? From what provision will the Protocol derive its authority? Secondly, and equally critically, what is the nature of a Protocol under our Treaty? Article 1(1) of the Treaty defines the word "Protocol" as follows:-

    " 'protocol' means any agreement that supplements, amends or qualifies this Treaty."

28. From its definition, a Protocol under our Treaty merely amends (i.e. adds to, subtracts from), clarifies, modifies or adds details to provisions that already exist in the Treaty. Absent a specific and express statement to that effect, it is not the normal function of a Protocol to operationalize the existing provisions of the Treaty. In this regard, the EAC Treaty has no reservations or similar constraints to the full and effective operation of any and all of its provisions. There is nothing at all in the EAC Treaty (and the Appellant has provided none) that stops, bars, fetters, hinders, or suspends the effective and effectual operation of the existing provisions of the Treaty (including Articles 111 through 114), unless and until the Partner States have signed and ratified a Protocol on the Management of the Environment and Natural Resources.
29. In this regard, the inclusion of Article 27(2) [on the future extended jurisdiction of the Court] is immensely instructive – namely, that when the venerable framers of the Treaty purposed to give a particular Protocol the function of operationalizing selected provisions of the Treaty, they did so expressly and concisely leaving nothing to the conjecture, imagination, or speculation of the reader. That Article of the Treaty provides as follows:
"27 (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".
30. In identical fashion, when the same framers of the Treaty intended to include inchoate provisions in the Treaty whose effect would be made operative only later at a subsequent date, they did so explicitly and unambiguously – such as in Articles 75 (on Customs Union), 76 (on Common Market), and 123 (on Political Affairs), whose paragraph 5 provides as follows:
"5. The Council shall determine when provisions of paragraphs 2, 3 and 4 of this Article shall become operative and shall prescribe in detail how the provisions of this Article shall be implemented."
31. Articles 111 through 114 as they stand now, do prescribe a set of responsibilities, obligations and standards in the environmental field, which each of the Partner States has solemnly undertaken to observe pursuant to the Fundamental Objectives of Article 5(3)(c), and the Operational Principles of Article 8(1)(c) of the Treaty. The Respondent's claim and contention in the Reference, concerns the interpretation of these manifold responsibilities, obligations and undertakings under the Treaty (as is), not the detailed minutiae and the trifling nitty gritties of the obligations and mechanisms as they will be fleshed out with clinical precision in any future Protocol on the matter.
32. The interpretation and application of the Treaty (now called for by the Respondent), is totally possible, and is effectively covered under Article 27(1) of the Treaty. Equally, the Court's power to ensure the Partner States' adherence to and compliance with the law, as thus interpreted and applied by the Court, is fully provided for under Article 23(1) of the Treaty. On these two Articles, hang all the claims and all the contentions of the Applicant in the instant Reference. Even the Respondent to that Reference (now Appellant in this Appeal), readily conceded to the "*operational effectiveness*" of the present Articles of the Treaty.

33. In our view, therefore, the Appellant's quibbling over the operationalization of certain Articles of the Treaty (notably Articles 111 through 114) by prior recourse to conclusion of a Protocol, is totally irrelevant to the issue now before this Court – namely: the Court's interpretation and application of the provisions of those Articles. It is at best an attempt to derail and to divert the Court from considering the real issue before it. At worst, we dare say, this quibbling is a terrible waste of time, if not a calculated abuse of this Court's process.
34. Before we conclude this matter, we would wish to address the general question of the commencement of Treaties and, in particular, the commencement and effectiveness of the provisions of the EAC Treaty. Article 139 of the EAC Treaty recapitulates and posits the essential history for a clear understanding of how that Treaty came into being and how the effectiveness of its provisions is to be better understood. That Article recapitulates, so to speak, the fact that the 1999 Treaty ("the current Treaty", as subsequently amended) was a successor to the earlier EAC Integration effort of the Permanent Tripartite Commission established by the Tripartite Commission Agreement of November, 1993, and it's Secretariat Protocol of November, 1994. It is with this background in mind, that Article 139 of the current Treaty then provides that:-

    "Upon the coming into force of this Treaty, hereinafter referred to as 'the appointed day', the Tripartite Commission and [its] Secretariat for Co-operation between the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania, shall both cease to exist."
35. The Treaty, as signed by the original three Partner States of Uganda, Kenya and Tanzania on 30th November, 1999, entered into force on the appointed day - namely, 7th July, 2000 when, pursuant to Article 152, all the three Partner States had duly ratified the Treaty, and deposited their instruments of ratification with the Secretary General. Upon the occurrence of that momentous event of the "appointed day", the Transitional Provisions of Article 140 of the Treaty ensured that there would be a smooth transit from the old regime of the Tripartite Commission and its Secretariat, into the new dispensation of the East African Community under the current Treaty - in particular, as regards the "transfer" of the former Commission Secretariat and staff, Council of Ministers' procedures, staff rules, and the terms and conditions of both the East African Court of Justice (EACJ), and the Legislative Assembly (EALA).
36. Most importantly, as regards the issue of the pending Protocols, Article 140 of the Treaty speaks volumes. Paragraph 6 of that Article ensures that no gap, of the kind feared by the Appellant in this Appeal, is left unattended. That paragraph categorically provides that:-

    "6. until the adoption of Protocols referred to in Article 151(1), the Council may make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty."
37. It is more than evident from the above-quoted provision that:-
    (i) there is no, and there can be no, lacuna in the law of the Treaty of the kind and to the extent now postulated by the Appellant in the Reference, inasmuch as the Council of Ministers is empowered to fill any gaps left, pending the conclusion of any Protocol envisaged under Article 151(1) of the Treaty; and

(ii) the Council of Ministers, in carrying out its function of filling any such temporary gaps, is enjoined to do so "in accordance with the provisions of the Treaty." Implicit in that command is the message and the understanding that on the "appointed day", all the provisions of the Treaty came into force. All the provisions, without exception – and, particularly so, those provisions (such as Articles 111 through 114) requiring no express implementing Protocols.

38. We are greatly fortified in our views expressed above, by the position taken by the Vienna Convention on The Law of Treaties 1969, whose Article 24(1) states that:-
"A Treaty enters into force in such manner as it may provide or as the negotiating States may agree."
In the instant case of the EAC Treaty, Article 139 read together with Articles 152 and 153 expressly and specifically appointed a day on which the Treaty was to come into force – namely, the day when all the [original Three] Partner States will have deposited with the EAC Secretary General, their instruments of ratification. That day came to pass on 7th July, 2000 [as now inscribed on the cover page of the Treaty].
39. In conclusion, we answer Issue No.2 in the Negative. The Trial Court committed no error in enforcing Chapter Ninenteen (Articles 111 through 114 of the Treaty, pending the conclusion of any Protocol for the Partner States' co-operation on Natural Resources and the Environment.
Issue No. 3: Whether the Trial Court erred in law by entertaining the Reference by recourse to complaints emanating from International Conventions and Declarations on Environmental matters regardless of the Same Having their Own Specific Dispute Resolution Mechanisms:
40. As we understood it, the Appellant's grievances on this score arose from his contention that the Trial Court, moved by the Applicant in the Reference (now Respondent), considered alleged violations by the United Republic of Tanzania of a long list of International Environmental Conventions and Declarations (such as the African Convention on the Conservation of Nature and Natural Resources, 2003; the Rio Declaration, 1992; the Stockholm Declaration; the UN Convention on Migratory Species of Wild Animals, 1979; the UN Convention on Biodiversity (CBD), 1992; the UN Declaration on the Environment and Development, 1992).
41. To the Appellant's mind, consideration by this Court of violations of the provision of any such Conventions and Declarations would constitute an error of law, in as-much-as each Convention and Declaration has its own dispute resolution mechanisms and institutions specific to the particular circumstances of every such Convention and Declaration. In this regard, the Appellant cited a number of examples, including the example of the African Convention on the Conservation of Natural Resources. Article XXX (1) of that Convention refers the settlement of disputes arising therefrom to "the Court of Justice of the African Union", whose decision "shall be final and not subject to appeal."
42. The Respondent, in answer to the Appellant's above position, made short shrift of the Appellant's allegations. In the words of the Learned Counsel for the Respondent:
"31.... [the allegations] leave one wondering whether the Appellant is indeed appealing against the right Judgment and if so, whether it has taken the time to fully appreciate the Judgment it now seeks to challenge. 32 ... I say this because a simple reading of the

Judgment appealed from would show that the Trial Court Did not take into account the International instruments cited in arriving at its findings."

43. We agree. A careful reading (indeed, any reading) of the Trial Court's Judgment in this matter leaves no doubt whatsoever about that Court's stand. In paragraphs 48 and 49 of that Judgment, the Court reiterating its holding in another case (*Reference No.2 of 2013: Democratic Party Vs. EAC Secretary General*: Judgment of the First Instance Division (dated 29th November, 2013), affirmed that:-
"…..this Court cannot purport to operate outside the framework of the EAC Treaty and usurp the powers of other organs created for the enforcement of obligations created by other instruments including the African Charter and Protocol."
44. The above *Democratic Party case* was subsequently, appealed to this Appellate Division (*EACJ Appeal No.1 of 2014*), wherein the Judgment of the First Instance Division (including the above-quoted affirmation) was discussed in detail – see paragraph 49 below.
45. Indeed, in paragraph 49 of its Judgment, the Trial Court took pains to clarify that:-
"... in 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 Ninenteen 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."
46. This, indeed, is the acceptable position at International Law. Had the Trial Court done otherwise – namely, entered into an evaluation or an assessment, of whether the United Republic of Tanzania had violated or infringed the provisions of these other International Conventions and Declarations, then the Court would have transgressed its mandate and boundaries, and encroached into the jurisdictional space of these other Conventions and Declarations [see *the Corfu case and the Ambatioles case of the ICJ*.
47. It is patently obvious that the Trial Court never took into account any alleged violations of the International Conventions and Declarations. It was for this reason that the Trial Court (in paragraph 50 of its Judgment) dismissed "*the second and "third limbs*" of the Preliminary Objection raised before it - to the effect that the "Applicant had no locus standi to institute a Reference premised on an alleged violation of International Conventions and Declarations." With this in mind, therefore, we are once more constrained to conclude that the Appellant is once again engaged in a diversionary argument.
48. But even if the Trial Court had in fact considered aspects of these International Instruments (as otherwise alleged by the Appellant) we, for our part, would not have been unduly alarmed. By being signatories to these other International Conventions and Declarations, the EAC Partner States, do subscribe to the various standards, norms and values of those Conventions - which standards, norms and values are also gleaned from the general principles of law recognized by the comity of Nations [see *Halsbury's Laws of England, 4th Edition Vol.8, Para 1402*].
49. It was for that reason that in the recent Appeal of the above *Democratic Party case [Appeal No. 1 of 2014, Judgment of 28th July, 2015]*, this Appellate Division held that:-
"…nothing can preclude the East African Court of Justice from referring to the

relevant provisions of the African Charter for Human and Peoples' Rights, its Protocol, and the 1969 Viena Convention on the Law of Treaties, in order to interpret the EAC Treaty. In as far as Articles [6(d), 7(2) and 8(1) (c)] of the EAC Treaty, especially Article 6(d), recognize the African Charter's relevance in the promotion and protection of human and peoples' rights, then compliance with those provisions of the African Charter become ipso jure an obligation imposed upon the Partner States under the EAC Treaty ….. We are, therefore, of the view that the East African Court of Justice has jurisdiction to interpret the African Charter on Human and People's Rights in the context of the EAC Treaty."

Hence, our answer to Issue No.3 is also in the Negative.

Issue No.4: Whether the Trial Court erred in aw in holding that it has the Powers to Grant a Permanent Injunction against a Sovereign Partner State Under the Treaty?:

50. The Appellant contended that the Court's jurisdiction – derived from Articles 27, 30, 31, 32 and 37 of the Treaty – confers on the Court only the power to deliver judgments, issue orders, interpret and give directions, plus temporary orders without the power to grant permanent injunctions against any sovereign member State of the Community. According to the Appellant, the "Sanctions" specified in Article 143 of the Treaty for defaulting member States, do not embrace the judicial remedy of a permanent injunction as those sanctions are the privilege of the Summit of the Heads of State to impose, after the recommendation of the Council of Ministers.
51. On the face of it, the Appellant's contentions seem unassailable. Upon closer scrutiny, however, they are quite porous. Indeed, as the Respondent argues, the Treaty is the wrong place to look for the basis of the Court's power to grant permanent injunctions. The rationale for this omission is the fact that "Injunctions being an equitable remedy, are available not at law [such as a Treaty or Statute], but in equity." We agree. We would only add that in the case of our Court, this equitable remedy is indeed encapsulated even within the body of the Treaty itself [Article 23(1)], as well as within the corpus of the Court's Rules of Procedure [Rule 1(2)], which Rules derive their life and authority from Article 42 of the Treaty.
52. In that regard, Article 23(1) of the Treaty provides that:-
"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."
53. In our view, the Court which was expressly created to be a "judicial body" must necessarily be clothed with all the attributes, powers, authority and stature ordinarily vested in similar judicial bodies. Such is necessary for the achievement of its fundamental objective, namely: *to ensure adherence to the [law]…and compliance with th[e] Treaty* – which tenet is indisputably paramount in the roster of reasons for the very existence of this Court of Justice.
54. To put the seal of finality on this matter, so to speak, the inclusion of Rule 1(2) of this Court's Rules of Procedure was a deliberate and well-thought out act. That Rule provides as follows:-
"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."
55. Concerning the above Rule, Learned Counsel for the Respondent got it right:

"inherent jurisdiction is inbuilt in every court of law." Stated differently, "inherent jurisdiction is that jurisdiction which enables the Court to xtens itself properly and effectively" [See Halsbury's Laws of England 4th Edition, Vol.37, Para 14 at p.23].

56. Accordingly, our answer to Issue No.4 is also in the Negative. Therefore, the Appellant fails on that score.
57. We now turn to the First Agreed Issue (No.1), which we have kept for the last.
    Issue No.1: Whether the Trial Court erred in Law in Entertaining the Reference Based on a Mere Proposal to Upgrade the Serengeti road?
58. The Appellant quoted a dictionary definition of the word "proposal" to the effect, among others, that a proposal is "an idea or plan that you mention for somebody else to think about."
59. Pitted against the above-quoted dictionary definition of a "proposal "the Trial Court was faced with a number of facts and factors in this Reference.
    In its Judgment of 20th June, 2014, the Trial Court fully addressed this very issue and made the following findings of fact:
    - Para 57: Without belabouring the point... there is little difference in the evidence presented by both the Applicant and Respondent because, one fact is obvious; namely that, the Respondent intends to upgrade the Natta Mugumu-Tabora B – Kleins Gate-Loliondo Road from its current status.
    - Para 58: The answer to both issues [(i) whether Government intends to upgrade, tarmac, pave, re-align create and/or commission a trunk road … across the World famous Serengeti; and (2) whether the disputed road exists and is in use] in the totality of all the evidence placed before [the Trial Court] can only therefore be in the affirmative;
    - Para 62: From the foregoing [i.e. concerns of UNESCO's World Heritage Committee] 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. …….. According to the report by Inter-Consult Ltd, "….. 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."
    - Para 63: [the Inter-Consult] report is dated 17th January 2011 and took into account the protestations by environmental based groups, including the Applicant [now Respondent in this Appeal];
    - The same report acknowledges that the road would have grave negative impacts to mitigate [which] ….53 kms stretch of the proposed road that passes through Serengeti would be constructed to "gravel standards only."
    - Para 70: 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 ... and has not started construction of the proposed road;
    - Para 71: 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; and

- 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.

60. We have reproduced above, the Trial Court's findings of fact in enormous detail. We have done so for a number of reasons. First, and most importantly, to demonstrate the primacy in our EAC system of law on the First Instance Division's role as the fact-finder *per excellence*. Second, to show that in its appreciation of the facts, the Trial Court established no definitive Government "action" in this matter, beyond the initial "proposal" to build the Serengeti Super Highway. As emphasized above, fact-finding in disputes brought before the East African Court of Justice is entrusted by the EAC Treaty in the sole and capable hands of the First Instance Division. The Appellate Division of our Court has no role in evaluating, assessing, ascertaining and making findings of fact. Article 35A of the Amended EAC Treaty, and the identical Rule 77 of the Court's Rules of Procedure, prescribe the scope of the Appellate Court's role and the boundaries of its jurisdiction in the following categorical terms:-
"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."
61. Appeals on points of fact are excluded. Conversely, however, the same Amendment to the Treaty which introduced the above-quoted Article 35A, did also provide for a new paragraph 3 to Article 23 of the Treaty, to the effect that:
"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."
62. It is quite evident from the above formulation that the First Instance Division (unlike the Appellate Division) is free to hear and determine any matter brought before it. It matters not, whether the matter is one of law, or fact or of jurisdiction, or procedural irregularity. As against that, the Appellate Division's jurisdiction is restricted only to the three matters (of *law, jurisdiction and irregularity*) which are enumerated in Article 35A.
63. Given the above, the issue now before this Appellate Division concerning whether the Respondent's Reference before the First Instance Division was one involving a "mere proposal", without action or decision of the Government of the United Republic of Tanzania, must be deferred to the findings of fact that were made by the First Instance Division, acting in its capacity as the Trial Court. Those findings have been set out above *in extensor* – the sum total of which is that, the Trial Court was hard put to find any action(s) or decision(s) taken by the Government to implement the proposed Serengeti road.
64. The Trial Court's findings of fact [to the effect] that the Government commissioned

Inter-Consult to do a report on the Strategic Environment Assessment (SEA) for the Northern road means no more than that the Government was merely exploring the feasibility of constructing that road. Indeed, the Government also received, considered and heeded UNESCO's concerns (such as the Report of the Decisions Adopted by the 34th Session of the World Heritage Committee in Brasilia, 2010). Nonetheless, all these, and more, were indicia not of any concrete action to construct the road; nor of decisions of the Government of the United Republic of Tanzania, taken in the furtherance of the plan to construct the Serengeti Super Highway. Rather, they were indicia of the Government's indecision, if one may say so, about implementing its intentions and its plans to construct the road – especially in the face of the formidable opposition of both the Respondent (ANAW), and the UNESCO's reports. Little wonder then that the Trial Court's Judgment concludes with repeated references to the Government's "initial plan", or "initial proposal". Nowhere in its above Judgment did the Trial Court come out clearly with a decision or ruling on whether or not the threshold, under Article 30 of the Treaty, for justiciable "action" was ever reached in this case.

A disturbing element of this Reference was the timing of the Appellant's belated raising of this critical point – one which the Appellant (as the Respondent then), never raised earlier– neither as a challenge before the First Instance Division, nor as a response to the Reference in his own pleadings. In the view of Counsel, Saitabao, one then wonders:-

"6. Why the Appellant despite raising numerous preliminary objections and having had such ample time and opportunity in the 4 long years the matter was in Court, never raised this decisive point;

7. Despite the Reference specifically making mention of the action complained [of] and the same being the main issue in contention, not once did the Appellant either in its pleadings or evidence rebut this fundamental point."

65. On these technical aspects of the matter, we agree with Counsel Saitabao. These are brand new points which had not been pleaded nor, indeed, been canvassed in the Trial Court at all. They must not be raised now on appeal – see *Ex Parte Firth [1882] 19 Ch. Div.419; North Staffordshire Railway Co. vs. Edge (1920) AC 254; "The Tasmania" [1890] AC 223; Tanganyika Farmers Association Ltd vs. Unyamwezi Development Corporation Ltd [1960] EA 620; Alwi A. Saggaf vs. Abedi Ali Algeredi [1961] EA 767.*

66. Moreover, all these "new" points, being matters of fact, there is the substantive aspect of our EAC Treaty Law (discussed in paragraphs 60, 61, 62 and 65 of this Judgment), which effectively creates a bar against this Appellate Division of the Court from entertaining substantive points of fact, irrespective of whether such facts are *"new" or "old".*

67. In view of the above belated challenge, therefore, we would conclude that the Trial Court did not err in entertaining the Reference, inasmuch as that Court did not have before it any challenge to the "*mere proposal*" to upgrade the Serengeti Road. Nonetheless, in the interests of administering justice to all, it was incumbent upon the Trial Court to assure itself that it was dealing with a real live dispute before it – and not a mere abstract proposition or theortical hypothesis for constructing a road whose only tangible "action" was the Government's commissioning of a feasibility study. In

this regard, the Court (like other courts elsewhere), has repeatedly emphasize the importance of a Court of law abstaining from entertaining mere hypothetical cases.

68. In our recent Judgment of *Alcon International Ltd vs. Standard Chartered Bank of Uganda, et el [EACJ Appeal No. 3 of 2013, Judgment of 27th July, 2015]*, we discussed the question of hypothetical cases at some length. We held that:
"‥ the doctrine of mootness or academic adventure of the Courts of Justice is well known. The *raison d'etre* of Courts of justice is to give binding decisions on live disputes …. If there is no live dispute for resolution … a Court of Justice would be wasting the public resources of time, personnel and money by engaging in a futile and vain exposition of the law."
69. In that *Alcon case (supra)*, we cited with approval the holding in *Borowski v the Attorney General of Canada [1989] SCR 342* to the effect that:-
"*The doctrine of mootness is an aspect of a general policy practice that a Court may decline to decide a case which raises merely a hypothetical or abstract question.*"
70. Equally, in *Legal Brains Trust (LBT) vs. Attorney General of Uganda, [EACJ Appeal No. 4 of 2012*, Judgment of 19th May, 2012], this Appellate Division addressed the issue of hypothetical/speculative cases at very great length.
The case involved the election of EALA Members in a prospective "election" which at the time of the litigation had not as yet been "called, announced, or even scheduled". We examined exhaustively the jurisprudence of, among others, the Court of Justice of the European Union, the Supreme Court of Nigeria, and the United States Supreme Court – see in particular the following cases: *Societe d' Importation Edouard Leclerc-Siplec vs. TFI Publicite' SA and M6 SA [Case C – 412/93, European Court Reports 1995, p. I-00179]; Robards vs. Insurance Officer, Case 149/82 [1983] ECR 171; C. D. Olale vs. G.O. Ekwelendu, [1989] LPELER – SC, 54/1988; Alhaji Yar'adua & Anor. Vs. Alhaji Abubakar & Others, Nigeria Weekly Reports, SC 274/2007; Re Pacific R. Commission, 32 Fed. 241, 225 (US Supreme Court); Muskrat vs. US, 219 US 346(1911) quoting Marbury vs. Madison; Steel Co. aka Chicago Steel & Picking Co. vs. Citizens for a Better Environment, 532 US 83 (1998); and Aetna Life Ins. Co. vs. Haworth, 300 US 227*.
71. In the above cases, the message is strong, comprehensive, and clear:
    - The function of courts is to contribute to justice in concrete disputes, not to give opinions on general hypothetical questions;
    - Jurisdiction is conferred on courts not to deal with hypothetical, academic or political questions;
    - The court must not deal in matters that are clearly lifeless, spent, academic, speculative or hypothetical; and
    - Judicial power is the right to determine actual controversies arising between adverse litigants.

    Accordingly, in the *Legal Brains Trust case (supra)*, we concluded that the question raised was clearly hypothetical, academic, abstract, conjectural and speculative – neither capable nor suitable of being entertained by the Court.
72. From all the above, to transform the instant Serengeti Reference from the abstract into being a live dispute, it was necessary to establish the threshold needed for an "action" under Article 30 of the Treaty (see paragraphs 75 – 79 below).

73. Notwithstanding the doctrine of mootness, discussed in paragraph 70 above, the Trial Court (in the instant Reference) did not err in granting (as it did) an injunction to restrain the United Republic of Tanzania from ever implementing its proposal to construct the Serengeti Super Highway as "initially planned". In our view, the grant of the injunction was proper and justified – given the imminent risk of irreversible damage inherent in any attempt to implement the "initial plan."
74. In this regard, it is quite evident that were the authorities of the Government of the United Republic of Tanzania to take any measures to activate their "initial plan" to construct the Super Highway through the Serengeti, as originally conceived, they would have, without a doubt, fallen foul of Tanzania's above-mentioned undertakings of Articles 6(d), 7(2) and 8 (1) I of the Treaty, read together with other provisions of the same Treaty (in particular, Articles 111-114). On this, the Trial Court did, indeed, make a specific finding, thus:
"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" – see last bullet of paragraph 59 of this Judgment.
75. Article 30 of the Treaty, under which the instant Reference was brought to this Court, opens the doors of this Court to permit any person(s) resident in East Africa, to challenge the legality of an "*Act, regulation, directive, decision or action*" of a Partner State or an institution of the Community on the grounds that it is unlawful or an infringement of the Treaty. Implicit in that Article, is the notion that the challenge – if it is a challenge against an "action" (i.e. in contrast, for instance, to an "omission" or "inaction" of a State) – must be in regard to an accomplished, full-fledged "action". In the instant Reference, there was no action at all on the part of the Government of the United Republic of Tanzania. All there was (as effectively established by the Trial Court), was a mere plan or proposal, a wish without more, to construct a road someday, in the future, through the Serengeti – see paragraphs 63, 64 and 65 (*infra*). To be operative, the "action "must be ripe. To be ripe, it must be beyond a mere intention, inception, or conception to do or abstain from doing something. That extra something; that additional something that makes the action ripe, is what is needed to actualize or fossilize a mere intention into a concrete "action"; an action that meets the threshold of Article 30 of the Treaty.
76. To meet the threshold of the kind of "action" contemplated in Article 30 of the Treaty, each case would have to be considered and analyzed on the content of its own unique circumstances. Nonetheless, as a general rule of thumb, the "action" must constitute more than a mere abstract idea, hypothetical plan, or academic postulate, or a dreamer's wish on the part of the potential actor. In the instant Reference, for instance, for the initial idea or plan to transform into objective action, the Government needed to have in place among many others, the following:-
    - Agreed architectural plans and drawings;
    - Bills of Quantities;
    - Cabinet approval of the Project;
    - Appropriate Budget, endorsed or approved by Parliament;
    - Commencement of the Loan process(es) for financing the Project, where

necessary;

- Commencement of the Procurement process (whether by public or private bidding), as appropriate;
- Practical manifestation of actual commencement of the engineering works (e.g. official field surveys, breaking ground, delivery of construction machinery and materials on the site, etc).

77. In our view, to pass the bar of Article 30 of the Treaty, the above accompaniments – whether singly or in multiples; and whether separately or in combination(s) – would signal the manifestation of an "action" or a series of "actions" on the part of the Government to actualize its plans to construct the impugned Super Highway.
78. In the case of a challenge to an "omission" or "inaction", on the other hand, the requisite ingredients and profile of the threshold would be quite different from the above. As underscored in paragraph 76 of this Judgment, each case would need to be assessed and determined strictly in accordance with its own particular and unique exigencies. For instance in this Court's case of *Attorney General of Kenya v Independent Medical Legal Unit, [EACJ Appeal No1of 2011], (the "IMLU case" )* the Government of Kenya was alleged to have "omitted":
    - to arrest the perpetrators of a rebellious massacre of 3000 citizens in the Mt. Elgon area of Kenya;
    - to investigate their cases;
    - to charge the suspects; prosecute them in the courts of law; and
    - generally to ensure that justice is done; etc, etc.
79. It is quite evident to us that in a Reference, such as the above *IMLU case*, the ingredients of the threshold for "omissions" of the State would have to be gleaned from, among others, the kinds of omissions or non-actions listed above.
80. Accordingly, our answer to Issue No.1 is in the Affirmative. Therefore, the Appellant succeeds on that issue.

    Issue No.5: Whether the Parties are entitled to the Remedies Sought
81. The Appellant has failed on three of the four issues canvassed in this Appeal. It has been a long, complex and harrowing judicial odyssey to bring the Reference to closure. The judicial road travelled by many to interrupt the grand plans for the Serengeti Super Highway, has been long and arduous, strewn at every junction of the road with all manner of twists and turns; and trials and tribulations. The Applicants have, against all formidable odds, partially triumphed in their quest (in this, the first Environmental Case of its kind to be brought before this Court). They brought the Reference and have prosecuted it not out of any wish for personal, corporate, or private gain; but out of the public spirited interest of the noblest kind – namely conservation, preservation and protection of a natural resource which (in this particular case), is truly a gem of a heritage, one-of-a-kind for all mankind. It is only fair, therefore, that neither Party be condemned to pay the costs of the other in this litigation, both here and in the Trial Court below. Rather, each Party should bear its own costs. We so order.
82. In the result:-
    (i) The Appeal is allowed as regards Issue No.1, but is dismissed as regards Issues No. 2, 3 and 4.

(ii) Except in respect of Issue No.1, the Judgment and Orders of the First Instance Division in the Reference, including the power of the Court to grant Permanent Injunction, are upheld;
(iii) Each Party shall bear their own costs of the Reference, both here and below.

It is so ordered.

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East African Court of Justice - Appellate Division
Appeal No. 4 of 2014

**Angella Amudo And The Secretary General of the East African Community**

Appeal from part of the Judgment and Order of the First Instance Division, Jean Bosco Butasi, PJ; J. Mkwawa, J; and Faustin Ntezilyayo, J; Dated 26th September, 2014 in Claim No. 1 of 2012

Before: E. Ugirashebuja, P; L.Nkurunziza VP; J. Ogoola JA; E. Rutakangwa, JA; A.Ringera JA
July 30, 2015

*Cause of action - Community and employees disputes- Jurisdiction ratione temporis- Procedural error- Proceedings a nullity and time-barred.*

*Article 30 and Article 31 of the Treaty for the Establishment of the East African Community.*

In 2008, the Appellant/ Claimant was appointed by the Council of Ministers of the East African Community as a Project Accountant and issued with a contract of twenty two months. Subsequent to her appointment, the Respondent notified the Claimant that she had been appointed, not as Professional Staff. She averred that this was a misrepresentation of the Council's decision and that a fixed five-year contract that was renewable once should have been issued as had been done to her predecessor.

The Claimant / Appellant filed Claim No1 of 2012 seeking a declaration that her tenure of appointment and the subsequent periodical extensions of the appointment were *ultra vires* the powers of the Respondent and inconsistent with the Staff Rules and Regulations and that she was entitled to a contract of employment for five years from the date of assumption of duty renewable once for another five years. The First Instance Division held that the Claimant was entitled to a contract of employment of five years and special damages for loss of earnings.

Being dissatisfied with the judgment, the Claimant appealed stating *inter alia* that the court erred in law by not awarding her general or aggravated damages and full costs as she had substantially succeeded in the claim.
In cross appeal, the Respondent averred *inter alia* that the trial court erred in law and committed procedural irregularities in considering the law, Council decisions and the evidence and in finding that the Claimant was entitled to a five year contract.

**Held:**

1) While the Court may be accessed by anybody under Article 30, the remedy under Article 31 is only available to employees of the Community. The right granted by Article 30 must be instituted within two months, while Article 31 imposes no such

limitation.

2) By the time the Appellant instituted the Claim, in December, 2012, she had long ceased to be an employee of the Community. Under the circumstances, the action should not have been maintained a under Article 31 but under Article 30.
3) Since the Claim was instituted about 27 months after the expiry of the initial tenure and nearly five months after the expiry of the last short-term contract, it was time barred and the Trial Court lacked jurisdiction *ratione temporis*.
4) The entire proceedings were a nullity thus the Appeal was dismissed and the Cross-Appeal allowed with costs.

**Cases cited:**

Basso v. Utah Power & Light Co., 495 F 2 d 906
Federal Hotel Sdn. Bhd v. National Union of Hotel Bar & Restaurant Workers (1983) 1 MLJ 175
Legal Brains Trust (LBT) v The Attorney General of the Republic of Uganda, EACJ Appeal No. 4 of 2012
Ludovick Sebastian v. R, Court of Appeal, Tanzania, Criminal Appeal No. 318 of 2007 (unreported)
Melo v. U.S., 505 F 2 d 1026
Muhammad Hafiz v. Muhammad Zakariya (1922) 49 I.A. 9
Norwood v. Renfield, 34 C 329
P. Dasa Muni Reddy v. P. Apparao (1974) 2 SCC725
Pasupuleti Venkateswarlu v. Motor & General Traders AIR 1975 S. C. 1409)
Patrick Ami v. Dominick Safari and Three Others, Court of Appeal, Tanzania, Civil Appeal No. 5 of 1998
Peters v. Sunday Post (1958) EA 424
Ram Manohar Lal v. N.B. Supply, AIR 1969 S.C. 1967
Richard Rukambura v. Isack Ntwa Mwakapila & Another, (CAT) Civil Appeal No. 3 of 2004 (unreported)
The East African Law Society & Four Others v. The Attorney General of Kenya & Three Others, EACJ Appeal No. 3 of 2011
The Hon. Attorney General of Tanzania v. African Network for Animal Welfare, EACJ Appeal No 3 of 2014
Trevor Price & Another vs. Raymond Kelsal [1957] EA 752
Wynn Jones Mbwambo v. Waadoa Petro Aaron (1966) E.A 241

**Judgment**

1. This Appeal seeks to assail the Judgment and decree of this Court's First Instance Division ("the Trial Court") dated 26th September, 2014 in Claim No. 1 of 2012 ("the Claim"). Apparently, both parties to this Appeal (the "Appeal") were not satisfied with that Judgment. It appears the Judgment did not meet each Party's desires and/or expectations.
2. The Claim was instituted on 27th September, 2012 by a Statement of Claim, against the Respondent. The basis of the claim was particularized in paragraphs 12 to 23, the most prominent of which run as follows:-

"12. The Claimant's claim against the Respondent is for a declaration that the tenure of appointment of the Claimant as Project Accountant initially for a period of 20 months and the subsequent purported periodical extensions of the appointment were *ultra vires* the powers of the Secretary General and inconsistent with the Staff Rules and Regulations of the Respondent, a declaration that the Claimant was entitled to a contract of employment for a period of 5 years from the date of assumption of duty subject to renewal once for another five years, general and special damages for loss of earning and the facts constituting the cause of action whose presentation to the Court arose on or about the 16th September, 2012 are outlined in the paragraphs below:-

13. Following an advertisement for the post of Project Accountant of the East African Community, the Claimant applied for the post and went through various stages of interview for the successful candidate. A copy of the advertisement is attached hereto and marked "ANNEX A 1".

14. Under Minute 2.1.3 of the minutes of the meeting of the Finance and Administration Committee of the Respondent Secretariat, the claimant was recommended for appointment as Project Accountant of the Community. An extract of minutes is attached hereto and marked "ANNEX A 2".

15. During its 16th meeting, the Council of Ministers of the Community accepted the recommendations presented to it and appointed the Claimant to the position of Project Accountant of the Community. A copy of Minute 6.1.3 by which the Claimant was appointed is attached hereto and marked "ANNEX A 3."

16. The Secretary General of the Community, acting *ultra vires* his powers and mandate contrary to Regulation 22(1) ( c) of the East African Community Staff Rules and Regulations, in implementing the decision of the Council, gave the Claimant a contract with a tenure of 22 months instead of fixed 5 years renewable once for another 5 years, knowing very well that the position to which the Claimant was appointed to was categorized as that of professional staff. A copy of the contract is attached hereto and marked "ANNEX A 4".

18. The Claimant upon appointment, took up employment with the Community, served very diligently and professionally in accordance with the scope of her duties, established financial controls including checking abuse of claims and executed all such legal assignments as were given to her by superiors from time to time.

19. Contrary to the Staff Rules and Regulations and in violation of established the (sic) Council of Ministers existing policies and actuated by malice, the Secretary General of the Community and/or his authorized deputies purported to employ the Claimant and to give her purported renewals of contract as they wished…….

20. The Claimant was dissatisfied with the actions of the Executive Officers of the Respondent in the irregular manner they implemented the Council decision to employ her and asked that the complaint be referred to the Council of Ministers for a decision. A copy of the petition and reminders to have the matter presented to the Council are attached hereto and collectively marked "ANNEX A 11".

21. On or about the 5th September, 2012, the Claimant wrote to the Secretary General of the Respondent requesting to be given communication of the decision

of the Council within 15 days of the last date of the meeting of the Council but no such communication was given within the said time or at all and hence the presentation of this claim in the Court. Copy of the communications is attached hereto and marked "ANNEX A 12."

22. The Claimant shall aver that the Respondent is vicariously liable for the wanton action of its Executive Officers herein outlined.
23. As a result of such actions the Claimant has sustained loss and damages:-
    (i) Loss of earnings for a period of 78 months at a minimum rate of US$6,128 totalling US$447,984.
    (ii) General damages for pain and suffering and mental anguish.

Wherefore the claimant prays to the Court for Judgment against the Respondent for:

A. A declaration that the tenure of appointment given to Claimant (sic) initially for a period of 20 months and the subsequent periodical extensions of the appointment up to 30th April 2012 were *ultra vires* the powers of the Secretary General and his deputies and inconsistent with the Staff Rules and Regulations of the Respondent.
B. A declaration that the Respondent (sic) was entitled to a contract of employment for a period of 5 years from the date of assumption of duty renewable once for another 5 years.
C. Special damages for loss of earnings in the sum of US$477,984.
D. General damages as per paragraph 23 (ii) hereof.
E. Aggravated damages for the wanton conduct of the Respondent's Executive Officers.
F. Costs of the claim on a full indemnity basis with interest thereon."

3. The Respondent resisted the claim. He asserted that the claim was time barred, and in the alternative, that the Claimant/Appellant was not an employee of the East African Community ("the Community") governed by the latter's Staff Rules and Regulations, 2006 as claimed.
4. In response, through her Reply to the Statement of Defence, the Appellant, belatedly claimed that as the claim was based on Article 31 of the Treaty for the Establishment of East African Community ("the Treaty") and not under Article 30, her claim was not barred by limitation under Article 30(2).
5. In its Ruling dated 2nd May, 2013, on the issue of limitation, the Trial Court found in favour of the Appellant. In so doing, it found itself seized with the necessary jurisdiction to entertain and determine the Claim on merit.
6. The agreed issues during the trial were accordingly:-
    "(a) Whether the Claimant's claim is time barred under Article 30(2) of the Treaty;
    (b) Whether the Claimant was a staff member governed by EAC Staff Rules and Regulations, 2006;
    (c) Whether the position of Project Accountant that the Claimant held would entitle her to a five year contract with a possibility of renewal;
    (d) What remedies are available to the parties?"
7. It is our considered opinion that as the issue of limitation had, rightly or wrongly, been disposed of in the Ruling of 2nd May, 2013, it was absolutely unnecessary to retain it as one of the live issues in the case.

8. In the Trial Court, the Parties gave affidavital, direct and documentary evidence in support of their respective positions.
9. In its Judgment the Trial Court ruled that:-
   (a) The Claimant's appointment for an initial period of twenty (20) months and subsequent periodical extension of the appointment up to the 30th April, 2012, were *ultra vires* the powers of the Secretary General and his deputies and inconsistent with the EAC Staff Rules and Regulations (2006);
   (b) The Claimant was entitled to a contract of employment for a period of five (5) years in accordance with the EAC Staff Rules and Regulations;
   (c) The Claimant was only entitled to special damages for loss of earnings to the tune of only USD 9,024.00 and not USD 477,984; and
   (d) The Claimant was entitled to half of the taxed costs.

   The claims for general and aggravated damages were dismissed.
10. This Judgment pleased neither party. The Appellant was the first to knock at the doors of this Appellate Division and the Respondent followed her footsteps with a cross-appeal.
11. The Appellant's dissatisfaction with the Judgment rested on four grounds, namely that:-
   (a) The Trial Court erred in varying her monthly consolidated package when the said pay was not an issue in the case;
   (b) The Trial Court erred in not awarding her "loss of earnings for the final terms of the contract duration;"
   (c) The Trial Court "erred in law in refusing to" award her "either general or aggravated damages"; and
   (d) The Trial Court erred in not awarding her full costs when she "had substantially succeeded in all the issues framed for determination."
12. On his part, the Respondent had a litany of complaints, citing 21 errors of law and procedure which he believed vitiated the impugned Judgment. As some of these grounds of complaint are interrelated, we have found the following to be the most pertinent:-

   "1. The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities when they confirmed the Respondent as a staff member governed by the EAC Staff Rules and Regulations, (2006) despite the evidence adduced to the contrary.

   2. The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities when they confirmed the position of Project Accountant that the Appellant held would entitle her to a five years Contract yet the project she worked under was to come to an end in less than five years.

   6. The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities when they failed to scrutinize and apply correctly Regulation (20) (2) of the EAC Staff Rules and Regulations, 2006 which restricts recruitment in positions not on Approved Structure for Positions in the Establishment of the Community of all Organs (Secretariat, EACJ and EALA) vis a vis Regulation 22 (1) (c) which provides for a five years contract for all professional staff.

The Honourable Judges of the First Instance Division erred in law in refusing to uphold the Estoppel Principle and find that the Respondent was bound by the signature she appended on the contract.

The Honourable Judges of the First Instance Division erred in law and even committed procedural irregularities by awarding special damages for loss of earnings when in fact the Appellant was employed legally as per Council decision and her contract was fully performed.

The Honourable Judges of the First Instance Division erred in law when it (sic) refused to award costs to the Respondent".

13. Prior to the hearing of the Appeal, a Scheduling Conference was held at which the Appellant was represented by Mr. James Nangwala, Learned Advocate and the Respondent was advocated for by Mr. Steven Agaba, learned advocate. The agreed issues for determination were:

"Whether the learned Judges of the First Instance Division committed procedural irregularities in considering the law, Council decisions and evidence adduced at trial in:-

(i) determining that the Appellant was a staff member governed by the EAC Staff Rules and Regulations, 2006;

(ii) holding that the position of Project Accountant which the Appellant held, would entitle her to a five year contract with a possibility of renewal, and

(iii) If so, whether their judgment should be varied or reversed to the extent of the irregularity."

14. Counsel for the Parties lodged their elaborate submissions in support of their respective stances in the Appeal.

15. Ahead of our consideration and determination of the issues raised by this Appeal, for a better appreciation of the dispute between the parties and our subsequent decision, we found it opportune to explore albeit briefly, the Claim's factual and legal background.

16. It is common ground that the Appellant is a professional Accountant and resides at Arusha, Tanzania. Under the Treaty, the Community, in order to attain its political, economic, social, cultural, and other objectives, is empowered, *inter alia*, to employ staff, both professional and non-professional and to engage in a number of development programmes and projects using its own internally generated funds and/or funds from the donor community or Development Partners, pursuant to Article 133 (a) of the Treaty. Such projects/programmes included the Regional Integration Support Programme ("the RISP") funded by the European Union.

17. To further facilitate the smooth functioning of the Community and promote harmonious working relationships, the Community's Council of Ministers ("the Council") has, under Article 14(3) (a) of the Treaty, powers to make staff rules and regulations. Such Rules and Regulations are already in place. These are the East African Community Staff Rules and Regulations, 2006 ("the Staff Rules"). The Staff Rules govern all members of staff of the Community including its organs and institutions. The Council in 2006 also approved the Community's establishment structure.

18. At its 14th Ordinary Meeting held between 24th – 28th September 2007, the Council

was informed of the resignation of one Mr. Ponziano Nyeko, from his post of Project Accountant and one Senior Engineer, Mr. Enock Yunazi (See Exh. P6). As shown in Exh P6:-

"The Council:

(a) Took note of the report that:-

(i) the two above – mentioned officers have tendered their notice of resignation from EAC employment;

(ii) both Officers handled specialized one-man sections, which would suffer as a consequence of their resignations, hence the need for their urgent replacements;

(b) Approved the advertisement of the two positions for recruitment of qualified persons on a competitive basis."

19. Mr. Nyeko had been employed for a period of five years in the RISP Project which period was, indeed, its life span. Following this approval, the vacant post of Project Accountant was advertised vide Exh. P1.

20. The recruitment process followed and ultimately the Council at its 16th meeting of 13/09/2008 (Exh. P5) appointed the Appellant as Project Accountant to replace Mr. Ponziano Nyeko.

21. The most pertinent parts of the Letter of Appointment of the Appellant partly stated the following:-

"Dear Ms. Angella Amudo.

**RE: Letter of Appointment as Project Accountant**

Following the approval of the 16th Ordinary Council of Ministers Meeting held on 13th September, 2008, I have the pleasure to inform you that you have been appointed as Project Accountant, under RISP Funding, with effect from 1st October, 2008 in accordance with the terms and conditions specified below:

**1. Post**

You will be employed as Project Accountant attached to the EAC Secretariat, funded under RISP Project. You shall not be considered as a regular staff member under the EAC Staff Rules and Regulations except where it is specified in this contract.

**2. Official Duty Station and Place**

Your official duty station and place of recruitment shall be Arusha, Tanzania.

**3. Effective date of Appointment**

The effective date of appointment is 1st October, 2008 or the date of assumption of duty.

**4. Tenure**

This contract will run from the date of assumption of duty up to June, 2010.

**5. Remuneration**

Your monthly remuneration will be a consolidated package of USD 6,128 (US Dollars Six Thousand One Hundred Twenty Eighty Only). No other benefits will be payable.

**6. Rights and Obligations**
Your rights and obligations shall be limited to the terms and conditions of this contract. In instances where rights and obligations are not specifically covered by this contract, the Secretary General will make a specific ruling, which will not set a precedent, and which will be based on the EAC Conditions of Services (sic) of staff at comparable levels.
**7. Dispute Settlement**
Any dispute arising from or in connection with this contract shall be settled amicably between you and EAC. Where an amicable settlement of a dispute or a conciliation procedure within fixed deadlines cannot be reached, the dispute will be referred to an Arbitration Panel of arbitrators. One arbitrator will be appointed by you, one by the employer and a third by both parties. The Arbitration Panel shall use the Arbitration Rules of the EAC Court of Justice.
**8. Separation**
You shall be separated from service if your contract is not renewed at its expiration. In the event that your contract is terminated, you shall be given one month written notice of such termination or one month remuneration in lieu of notice. Similarly, if you wish to resign, you shall give one month notice or one month remuneration in lieu of notice.
**9. Acceptance**
If the terms and conditions spelt out in this contract are acceptable, please sign the attached slip and return it to the Secretary General for further processing.

Yours Sincerely,

Amb. Juma V. Mwapachu
Secretary General
CC: Accounts

I, Angella Amudo
..... (Employee's full name in capital letters)
Do hereby accept the appointment/contract dated 29th September, 2008 Offered to me as Project Accountant, in accordance with the terms and conditions mentioned hereinabove.
Signature ..... Date: .17th October, 2008"

22. The Appellant assumed duty on 1st November, 2008. She served the full term of her contract, without a word of complaint enjoying all the benefits of the contract.
23. Upon expiry of her formal Contract of Employment, the Appellant was given periodic "Short-Term Employment Contracts", in the same position which she, apparently, gladly accepted. On 27th April, 2012, the Respondent informed her by letter (Exh. P20), that her "Short-term contract as Project Accountant which expires on 30th April, 2012 will not be renewed." She was formally thanked for the services she had rendered to the Community and wished success in her future endeavours.
24. She reacted instantly. By her letter dated 30th April, 2012 (Exh. P21), she expressed

her dissatisfaction with the decision to terminate her employment as it was contrary to the Council decision of 13/09/2008. She maintained that, the contract ought to have "been running for five years renewable once". She sent another letter to the Respondent dated 8th May, 2010 (Exh. P22), for the first time registering her grievances on her "irregular appointment terms..." When the Respondent failed to act favourably, she forsook the arbitration route and accessed the Trial Court.

25. The Trial Court found merit in her claims. It held, as already shown, that the Appellant was a staff member of the Community. She was, therefore, found to have been entitled to a five year contract, but denied her damages and half her costs.
26. We have carefully and dispassionately studied all the material before us including counsel's able submissions in Appeal. We are increasingly of the view that an effective disposal of this appeal hinges on whether the Trial Court properly interpreted the pleadings, the relevant Treaty provisions, the Staff Rules as well as the evidence, before concluding that the Appellant was a staff member governed by the Staff Rules, and, further to that, by holding that the Claim was properly laid under Article 31 of the Treaty. We approach this crucial issue well alive to the fact that there is a whale of a difference between the requirements of Article 30 and those of Article 31. The two are mutually exclusive.
27. Article 30 provides in relevant parts, thus:-
    "1. Subject to the provisions of Article 27 of this Treaty, any person who is a resident of 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;"
28. On the other hand, Article 31 is in the following terms:-
    "The Court shall have jurisdiction to hear and determine disputes between the Community and its employees that arise out of the terms and conditions of employment of the employees of the Community or the application and interpretation of the staff rules and regulations and the terms and conditions of service of the Community."
29. Two clear and distinct differences are immediately discernible from the two provisions. One, while the Court may be accessed by anybody under Article 30, including the Community employees, the remedy under Article 31 is only available to employees of the Community qua employees. Two, while the right granted by Article 30 is circumscribed in the sense that the proceedings must be instituted within two months, Article 31 imposes no such limitation. All the same, on this latter aspect, this rider is imperative. It is not every dispute between the Community and its employee (s) that is justiciable under Article 31. The dispute or cause of action must have arisen out of the "terms and conditions of employment" or "the application and interpretation of the staff rules and regulations and conditions of service of the Community." Outside that, the action will be unmaintainable.
30. The above conclusion of necessity takes us back to the pertinent issue we posed in

paragraph 26 above. This is whether the Claim was properly laid, entertained and determined by the Trial Court under Article 31 of the Treaty.

31. Indeed, on this counsel for both parties deserve tributes. They had by consensus submitted this as the first issue at the Trial Court's Scheduling Conference. Unfortunately, however, at the urging of the Trial Court, it was abandoned altogether. Instead, what was their second issue, which reads:-
"(a) Whether the claimant's claim is time barred under Article 30(2) of the Treaty,"
– became the first issue.
32. In our respectful opinion, once the first issue which read:-
"(a) Whether or not the Claimant's claim is governed by Article 30 or 31 of the Treaty,"
was discarded, this issue became completely irrelevant. All the same, the Trial Court dealt with it before the trial started. Ultimately, as we have already indicated, it was decided on the basis of Article 31 which the Trial Court found, and very correctly, to be open-ended, a situation we find to be very unsatisfactory. It found the Claim, therefore, not time barred as it involved a dispute between the Community and its employee (the Appellant). In our respectful opinion, this is where the Trial Court first went wrong. It failed to appreciate the nature and substance of the Appellant's claim. We are saying so advisedly and for the following reasons.
33. It is common knowledge that any claim or suit be it in tort, contract, etc; must always be based on a cause of action. A cause of action is the reason or basis for which a suit or claim is brought. If we may borrow the words of the Privy Council in *Muhammad Hafiz v. Muhammad Zakariya (1922) 49 I.A. 9*, and use them here, we would explain it in understandable language to be:-
"...the cause of action is that which gives occasion for and forms the foundation of the suit..."
34. We take it to be settled law that there can be no suit, without a cause of action having accrued to the claimant or plaintiff. It is equally settled that a cause of action should always be gleaned from the plaint or statement of claim and not from the claimant's assertions from the bar or submissions. In this particular case, the Appellant's cause of action could only be traced in her Statement of Claim, particularly paragraphs 12, 15, 16, 19, 20, 22 and 23.
35. We have had the advantage of reading the Appellant's Statement of Claim and its annexures. It was obvious, even to the naked eye that the Appellant's sole basis (cause of action) of her claim against the Respondent was the alleged illegal decision of the Respondent of appointing her as a Project Accountant under the RISP funding for a period running from 1st October, 2008 to 30th June, 2010. To her, the Respondent acted in excess of his mandate and in bad faith (that is, *ultra vires* his powers), as the appointment was contrary to the directives of the Council. This decision led her to suffer general and specific damages as indicated therein. She was accordingly challenging the legality of the Respondent's decision and seeking the Court's declaration to that effect. This pleading, therefore, took the Appellant's claim out of the ambit of Article 31.
36. As we have already sufficiently demonstrated, a claim under Article 31 is strictly confined to disputes between the Community and its employees under the situations stipulated therein. It is glaringly clear to us that this was not the case here, for two self-

evident reasons. One, by the time the Appellant instituted the Claim, in December, 2012, she had long ceased to be an employee of the Community, even under the RISP funding Project. As per paragraph 13 of her contract of employment (Exh. P5), she was effectively "separated from the service" of the Community on 30th April, 2012. It is totally inconceivable, under the circumstances, that she would have maintained an action under Article 31. It is unfortunate that the Trial Court took it for granted that she was still an employee of the Community. We are saying so deliberately because in its Ruling concerning the competence of the Claim, the learned trial Justices never addressed themselves to the Parties' pleadings having in mind this specific issue.

37. Two, what was being challenged was the legality of the Respondent's decision, which fell squarely within the four corners of Article 30. The Appellant, being a resident of one of the Partner States, and in view of our decision, in *The East African Law Society & Four Others v. The Attorney General of Kenya & Three Others, (EACJ) Appeal No. 3 of 2011*, she had locus standi to institute such a claim against the Respondent.
38. From the above discourse, it is our conclusive finding that the Claim was based in and governed by Article 30 of the Treaty and not Article 31 as the Trial Court irregularly held. Since the Claim was instituted about 27 months after the expiry of the initial tenure and nearly five (5) months after the expiry of the last short-term contract, it was unarguably time barred. It ought to have been dismissed with costs. The Trial Court did not do so, but proceeded to determine it on merit with no voice of dissent from the Respondent. Was that proper? We have no flicker of doubt in our minds that it was not. We shall endeavor to elaborate why.
39. There is no gainsaying that the defence of limitation had challenged the Trial Court's jurisdiction to entertain the Claim and determine it on merit. What the Respondent was saying, briefly, was that the Trial Court lacked jurisdiction ratione temporis.
40. It is trite law that any court's jurisdiction can be challenged at any stage of the proceedings even at the appellate stage. Furthermore, a challenge on jurisdiction must be decided and not assumed, and once the challenge is positively proved, the proceedings must be dismissed.
41. It is also common knowledge that a judgment rendered by a court or tribunal without jurisdiction is a nullity forever. The cases in which these principles have been propounded are legends: See, for instance, *The Hon. Attorney General of the United Republic of Tanzania v. Africa Network for Animal Welfare (ANAW) (EACJ), Appeal No. 3 of 2011, Motor Vessel ("Lillian S") v. Caltex Oil (Kenya) Ltd. [1989] K.L.R. 1, Fanuel M. N'gunda v. Herman N'gunda (CAT) Civil Appeal No. 8 of 1995 (unreported), Melo V. U.S., 505 F 2 d 1026, Basso v. Utah Power & Light Co., 495 F 2 d 906, Richard Rukambura v. Isack Ntwa Mwakapila & Another, (CAT) Civil Appeal No. 3 of 2004 (unreported)*.
42. May be it would be more refreshing to return to the case of *Norwood v. Renfield, 34 C 329* in which it was tellingly held that:-

    "A universal principle as old as the law is that proceedings of a court without jurisdiction are a nullity and its judgment therein without effect either on person or property."
43. In *P. Dasa Muni Reddy v. P. Apparao (1974) 2 SCC725*, the Supreme Court of India held that estoppels or waivers cannot confer jurisdiction to an authority which it does

not possess. In *Richard Rukambura's case (supra)*, the Court succinctly held that:-

"On a fundamental issue like that of jurisdiction a court can *suo motu*, raise it and decide the case on the ground of jurisdiction without even hearing the parties."

44. Basing on the above principles, Abdoolcadel, J., in the Malaysian case of *Federal Hotel Sdn. Bhd v. National Union of Hotel Bar & Restaurant Workers (1983) 1 MLJ 175* at page 178, stated with sufficient lucidity thus:-

"...jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence. It is a fundamental principle that no consent or acquiescence can confer on a court or tribunal with limited jurisdiction to act beyond that jurisdiction, or can estop the consenting Party from subsequently maintaining that such court or tribunal has acted without jurisdiction [*Essex County Council v. Essex Incorporated Congregational Church Union* (at pages 820-821 per Lord Reid)]. This principle that jurisdiction cannot be conferred by agreement or estoppel was firmly reiterated recently by the English Court of Appeal in *Secretary of State for Employment v. Globe Elastic Thread Co. Ltd* in a decision which was reversed by the House of Lords but affirmed on this point."

45. We fully subscribe to this salutary holding.
46. Furthermore, we hasten to add that we found it necessary to refer to authorities from diverse jurisdictions in order to demonstrate the universal character and applicability of those principles. We shall, accordingly, be guided by them in our determination of this Appeal.
47. We are also mindful of the fact that in determining its jurisdiction at the threshold, a court must be guided by the relevant law(s), treaties inclusive, and the parties' pleadings and not by the parties' allegations or assertions of facts from the bar.
48. Alive to the legal requirement to determine its jurisdiction first, the Trial Court, as alluded to earlier on, embarked on this process before going to the merits of the claim. In its ruling it fell hook, line, and sinker for the Appellant's claim. May be unaware of the clear Ruling of this Court (for there is not even a fleeting reference to it) in the *East African Law Society and Four Others v. The Attorney General of Kenya and Three Others, (supra)* to the contrary, the Trial Court held:

"Further, the office of Secretary General, the Respondent in the claim, is neither a Partner State nor an institution of the Community under Article 9 of the Treaty as read together with Article 30 above. The import of both provisions is that no proper claim can be made by an employee qua employee against the Secretary General by the invocation of Article 30.

Conversely, Article 31 is titled, "Disputes between the Community and its Employees". For the avoidance of doubt, the Article provides as follows..."

49. In the *East African Law Society and Four Others case (supra)*, the Court decisively preferred a purposive construction of Article 30 to the narrow and restrictive one adopted by the Trial Court in this case. It held that the Organs of the Community were not excluded from the application of Article 30.
50. Consequently, and with due respect, without in any way addressing itself to the pleaded facts in the Statement of Claim alleged to constitute the cause of action, the Trial Court held that the Claim was laid under Article 31 which has no limitation encumbrances.

51. We have also found from the Ruling that what weighed heavily on the minds of the learned trial Justices before so concluding was the wording of the Appellant's pleadings, which was entitled "Statement of Claim". To them, this was conclusive proof that the Claim was based on Article 31 and not Article 30 of the Treaty. However, in so concluding they appear to have pigeon-holed two salutary maxims of respectable antiquity, one Latin and one French. These are: "*Cucullus non facit monachum*" *(L) and/or "L'habit ne fait pas le moine" (Fr.)*. Freely translated they both mean that "The cowl (a monk's hooded garment) does not make the monk". That is what Shakespeare had in mind when he wrote that a Rose by any other name would smell just as sweet. We also find with profound respect to the Learned Trial Justices, that they appear to have unwittingly failed to take cognizance of the settled principle of adjective law that parties are always bound by their pleadings.
52. From all the above, it is our finding that the Claim had its basis in Article 30 of the Treaty, and ought to have been instituted within two months of the Respondent's decision.
53. Since the Claim was patently time barred, the Trial Court lacked jurisdiction *ratione temporis*. Inaction, through either ineptitude or otherwise, of Counsel for the Respondent, could not confer jurisdiction on the Trial Court to entertain the Claim which was patently time barred in terms of Article 30(2).
54. When we pointed out this fact to Ms. Piwang', Learned Counsel who advocated for the Appellant at the hearing of the Appeal, she was apparently not taken aback. She gallantly argued that the Claim could not have been time barred as the Appellant was pursuing the matter through administrative channels, that is, by complaining to the Secretariat. To buttress her argument, she confidently referred us to the Appellant's letters dated 30th April, 2012 (exh. P 21) and 8th May, 2012 (exh. P 22).
55. We have found no merit in that argument. It is totally untenable in law. This is because, as was correctly held in the case of *Patrick Ami v. Dominick Safari and Three Others (CAT) Civil Appeal No. 5 of 1998*: -
    "Protests and complaints other than judicial proceedings, do not count in the reckoning of periods of limitation, but may be relevant in seeking extension of time."
56. The above holding notwithstanding, we have found it imperative to point out that in any event these protests were made after the Appellant's contract of employment had come to an end.
57. All said and done, we hold without any demur that the entire proceedings in the Trial Court were a nullity on account of want of jurisdiction. We, accordingly, quash and set them aside. If authority for this is needed, we shall quickly refer to our decision given in *Appeal No. 4 of 2012 Between Legal Brains Trust (LBT) and The Attorney General of the Republic of Uganda*, wherein we nullified the proceedings in the First Instance Division which had been determined on merit when the Trial Court had no jurisdiction to entertain the matter.
58. Under normal circumstances we would have rested the matter here. But for the purpose of completing the record and providing guidance for future actions, we shall go further and venture our opinion on the issue agreed on in this appeal.
59. In deciding that the Appellant was a staff member governed by the Staff Rules, the Trial Court Justices placed much reliance on the uncontested facts that:-

(a) The job advertisement (Exh. P1) did not indicate that the position of Project Accountant was governed by the RISP agreement;
(b) The Finance and Administration Committee in its 8th – 9th September, 2008 meeting, recommended to the Council the appointment of the Appellant in the Professional Staff position as Project Accountant to replace Mr. P. Nyeko, and
(c) the Council acting on that recommendation at its 16th meeting appointed the Appellant "to the position of a Project Accountant as a professional staff."

60. But to the chagrin of the Trial Court's Justices:-
"...when on 29th September, 2008 the Respondent came to implement the above Council's decision, he informed Ms. Angella Amudo that she had been appointed as Project Accountant in the category of Professional Staff but as a Project Accountant attached to the EAC Secretariat funded under RISP Project. It is indicated in the said letter that the appointment was not to be considered as a regular staff member under the EAC Staff Rules and Regulations (2006), except where it was specified so in the contract."
61. Thereafter, having made a fleeting reference to Articles 70(2) and 14(3) (a) of the Treaty, the Learned Trial Justices held that the Respondent was not vested, under Articles 9 and 16 "with powers to amend or review a Council's decision". They then decisively held that:-
"...the letter of appointment of Ms. Angella Amudo as Project Accountant under RISP was not in conformity with the Council's decision."
62. That is how Issue No. 2 before the Trial Court was answered in the affirmative.
63. The crucial issue at this juncture would have been whether the Respondent amended or reviewed the Council's decision regarding the employment of the Appellant, as vigorously argued by her, and held by the Trial Court but strongly denied by the Respondent. Indeed, to us, that was the mainstay of the Appellant's complaint.
64. The holding of the Trial Court that the Respondent acted *ultra vires* his powers in amending the Council decision, generates this germane question: was the finding based on solid facts as argued by the Appellant, or on a misapprehension of the evidence, improper inferences from the proven facts and a misinterpretation of the provisions of the Treaty and the Staff Rules, as pressed by the Respondent?
65. We are fully aware that a court commits an error of law or a procedural error when it:-
(a) misapprehends the nature, quality, and substance of the evidence: See, for instance, *Peters v. Sunday Post (1958) EA 424; Ludovick Sebastian v. R, (CAT) Criminal Appeal No. 318 of 2007 (unreported)*;
(b) draws wrong inferences from the proven facts: see, *Trevor Price & Another vs. Raymond Kelsal [1957] EA 752, Wynn Jones Mbwambo v. Waadoa Petro Aaron (1966) E.A 241*; or
(c) acts irregularly in the conduct of a proceeding or hearing leading to a denial or failure of due process (i.e. fairness) e.g irregularly admits or denies admission of evidence, denies a party a hearing, ignores a party's pleadings, etc: see, *The Hon. Attorney General v. ANAW (supra)*.
66. We are also alive to the fact that in the administration of justice, procedure is essential. It facilitates justice and furthers its ends. But it must never thwart it, hence the mundane truth that rules of procedure are but handmaidens of justice and not mistresses of the

judicial process (*Pasupuleti Venkateswarlu v. Motor & General Traders AIR 1975 S. C. 1409*). Rules of procedure must, accordingly, be construed liberally and in such a manner as to render the determination and enforcement of substantive rights and duties effective. It is persistently postulated, that a hypertechnical view should not be adopted by the courts in interpreting and applying them. As aptly observed by the Supreme Court of India, in the case of *Ram Manohar Lal v. N.B. Supply, AIR 1969 S.C. 1967*, a party cannot be refused just relief because of some mistake, negligence, inadvertence or even infraction of the rules of procedure, not going to the root of the matter of course. These rules are in all cases intended to be aids to a fair trial and for reaching a fair decision and not a bar to the search for the truth in a case in order to achieve substantive justice.

67. We wish to emphasize that a distinction has to be drawn between provisions which confer jurisdiction and those which regulate procedure. Although jurisdiction can neither be waived nor created by consent, as we have already demonstrated, a procedural provision may be waived (*Superintendent of Taxes v. Orkrarman Nathman Trust, (1976) 1 SCC 766: AIR 1975 S. C.C. 2065 para 27, 28*). This accounts for the inclusion of Rule 1(2) in the East African Court of Justice Rules of Procedure, 2013 ("the Court Rules") which reads:-

    "Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

68. It is obvious that given the plain language in this provision, we are enjoined to give the Court Rules a liberal construction so as to effectuate the remedial purposes of Rule 1(2), i.e. to aid the Court in attaining substantive justice.
69. It was the Respondent/Cross Appellant's strong contention that the Learned Trial Justices misapprehended the nature, substance and quality of the entire evidence before them. Mr. Agaba forcefully argued that the Learned Trial Justices either without justification failed to admit relevant evidence, or completely ignored admitted credible evidence from Mr. Joseph Ochwada, Mr. Juvenal Ndimurirwo, and Dr. Julius Tangus Rotich which would have proved or tended to prove beyond any doubt that the Appellant had never been a staff member of the Community covered by the Staff Rules.
70. The Respondent strenuously maintained that contrary to the protestations of the Appellant through her learned advocate, Mr. Nangwala (who represented her at the trial), he never amended the Council's decision. To him, the letter of appointment issued to the Appellant was in accord with the Council Decisions (EAC/CMII/ Decision 125 and EAC/CM 16/Decision 41) as well as the Staff Rules.
71. On her part, the Appellant strenuously urged us to uphold the Trial Court's Decision as the Respondent acted contrary to the clear Directives of the Council contained in EAC/CM 16/Decision 41. She also confidently asserted that as she was employed in the professional cadre, the position of Project Accountant was an established position within the Community.
72. In resolving these diametrically opposed positions, we found it convenient to start with the Treaty and the Staff Rules. It is provided in Article 16 that the regulations, directives and decisions of the Council taken or given under the Treaty provisions

"shall be binding on the Partner States, on all organs of the Community...", except the Summit, the Court and the Legislative Assembly (EALA), "within their jurisdiction". In terms of Article 9 (g) of the Treaty the Secretariat and the Council are both Organs of the Community, hence the Respondent is bound by the mandatory provisions of Article 16 and of Regulation 20.

73. We have already shown that the Council has already promulgated the Staff Rules as mandated by Article 14(3) (a) of the Treaty. It is explicitly provided in Regulation 20(2) that:-

"No recruitment shall be undertaken unless an approved vacancy exists in the establishment of the Community and for which financial provision has been made."

74. We believe that the language used here is very plain and needs no interpolation.
75. There is no dispute on the fact that the Staff Rules on which the Appellant's Claim is pegged were promulgated long before she joined the Community. The Respondent tendered evidence before the Trial Court, whose authenticity has never been doubted or challenged to date, in the form of the Establishment Structure (Exh. R.E.1) passed by the Council in August, 2006, to bear him out on his stance. This irrefragable evidence, shows vividly in page 7 (page 233 of the Record of Appeal) that the position of Project Accountant is not an established position in the Community. This, in our respectful opinion, ought to have told it all to the Learned Trial Justices, if they had taken the trouble to glance at it. Mr. Ochwada, (the Community's Director of Human Resources and Administration), Mr. Ndimurirwo, (the then Community's Acting Director of Finance) and Dr. Rotich, (the then Deputy Secretary General), persistently stated that the Appellant was not a member of staff covered by the Staff Rules. They maintained that, like her predecessor, Mr. Nyeko, she was at all material times while at the Community working under the RISP Project.
76. On this, they are wholly supported by the Appellant's own evidence, Exh. P2 (the Letter of Appointment), without which she would never have seen the inside of the Community. It is specifically provided therein that she was being employed as "Project Accountant under the RISP funding," and she "shall not be considered as a regular staff member under the Staff Rules and Regulations." She freely and voluntarily accepted the position and worked under those clear conditions until her tenure expired, and thereafter readily accepted short-term contracts until 30th April, 2012. She cannot now be heard to complain. We would be failing in our duty to render justice without fear or favour, if we let her both eat her cake and have it at the same time.
77. In addition, in their respective Affidavits filed on 13th March, 2013 prior to the formal hearing, on 11th November, 2013, both Mr. Ochwada and Mr. Ndimurirwo, individually deponed that:-

"...the employees of the Community are employed in two different categories, namely the established positions governed by the East African Community Staff Rules and Regulations, 2006 and in Project Positions funded by various EAC Development Partners governed by respective co-operation Agreements concluded between EAC and such Development Partners."

78. Dr. Rotich deponed in similar vein and added:-

"10, That the claimant, during her tenure, was one of the professional staff working

as a Project Accountant funded under RISP Project, hence not an officer recognized under Regulation 22(1) (c) of the East African Staff Rules and Regulations."

79. We have found nothing strange in this. This is because not all professionals, let alone Professional Accountants, are members of staff of the Community. This evidence was never challenged by way of a replying Affidavit or at all.
80. The Appellant's persistent assertions that she was a regular member of staff under the Staff Rules, therefore, flies in the face of this massive evidence to the contrary, although, admittedly, in its decision of 13/9/2008 the Council did not specifically state that the term of the Appellant "should be limited or pegged to the remaining project life span" as correctly contended by Mr. Nangwala. All the same, in our considered opinion, the Council had no duty to do so for the following two clear reasons. One, the Appellant's position was not an established one within the Community. Two, the Council had so clearly pronounced itself in its earlier decision (EAC/CM/11/ Decision 125) when it established the position of Project Accountant which was first held by Mr. Nyeko. This is clear from the evidence of Mr. Ochwada (pages 360-1). In his comprehensive evidence, he unambiguously elaborated on how RISP came about in 2006.
81. Mr. Ochwada, partly, said:-
"RISP was a programme which was developed by the European Union to support regional integration matters for three legs namely EAC, COMESA and SADC... The EAC was a beneficiary, but because the EAC had not signed the contribution agreement directly with EU, it had to get funds through COMESA which had a direct contribution agreement with EU. So, what happened is that when this programme was developed and the EAC became a beneficiary in 2006, the accountants on the ground were fairly thin. This is when the Secretariat requested the Council to approve a position which would be funded under the RISP funding to take care of these funds. That is how the position of RISP Project Accountant was approved by the Council during its 11th Meeting which was held on 20th March, to 4th April, 2006. It was specifically for the period of funding because the funds were coming in for a period of five years.".
82. We must confess that after scanning the entire evidence on record, we have not gleaned therefrom an iota of evidence contradicting this piece of vital evidence. On the contrary, we have found on record evidence from the Appellant tending to bear out Mr. Ochwada on this. This is contained in Exh.P6, wherein it is shown that the Council, after taking cognizance of the resignation of Mr. Nyeko, and noting that he had been handling a " specialized one-man section, which would suffer as a consequence" of his resignation, recognized the urgent need for his replacement. It accordingly approved an advertisement of the position "for recruitment of qualified persons." This evidence discredits the Appellant in her assertion that the position of Project Accountant was an approved position within the Community Establishment. If that was the case, the Council would not have undisguisedly categorized it as "a specialized one-man section", which would have been paralyzed by Mr. Nyeko's departure unless an immediate replacement was found.
83. It is on record, and even in the Judgment of the Trial Court, that the Parties had agreed that whatever evidence given in support or against the Claim should be backed

either by the Staff Rules and the Council's directives, decisions, recommendations and/or opinions. Our study of the evidence did not lead us to any point where the Appellant doubted the existence of Council Decision 125. However, it is surprising, if indeed the Appellant was seeking justice, that when Mr. Ochwada wanted to read the contents of this Decision, Mr. Nangwala strongly objected, claiming that that was new evidence barred by Rule 39 (2) of the Court as that extract was not annexed to the Respondent's pleading. Although he did not dispute the existence of the decision, he was supported by the Trial Court. Yet, we find the trial Court lamenting in its judgment that:-

"The group of words 'lifespan of the project' at this preliminary stage is neither meaningful nor helpful unless we pursue the analysis of the whole process of the recruitment."

84. But who is to blame for this quagmire? The Trial Court had sacrificed that piece of crucial evidence at the altar of hypertechnicality. This is where it could have invoked Rule 1(2) of the Court Rules to attain "the ends of justice". Rule 39 is not a jurisdictional rule. Depending on the facts of each case, it can be interpreted in such a way as not to lead to a failure of justice. Fortunately, the evidence of Mr. Ochwada on this point was readily at hand to aid the Trial Court attain substantive justice in the case. But it was jettisoned to the winds. It was not considered at all.
85. With these observations and findings in mind, we can now confidently say that after objectively scrutinizing the impugned Trial Court's Judgment we regrettably learnt that in canvassing issue No. 2, the Learned Trial Justices never touched the evidence of Mr. Ndimurirwo and Dr. Rotich at all. Not only that; they did not refer, even fleetingly, to both Exh. P2 and Exh. RE1. Furthermore, the above quoted evidence of Mr. Ochwada, which was favourable to the Respondent, was not discussed at all, even for the purpose of rejecting it, but with good reason. More disturbing, while correctly directing their attention to the peremptory provisions of Article 16 of the Treaty in order to find the Respondent liable, they, with due respect, failed to address themselves to the equally mandatory provisions of Regulation 20 (2) of the Staff Rules, which bind both the Council and the Respondent. Since the position of Project Accountant was not an established position, none of them could have validly engaged the Appellant as a member of staff under the Staff Rules.
86. The above cited omissions and irregularities, in our considered opinion, lead to only one irresistible conclusion. This is that the Learned Trial Justices committed errors of law and procedure, commissions and omissions which led to a wrong decision and, therefore, a failure of justice, as well articulated by Mr. Agaba in his submissions. It would, therefore, have been our specific finding that the Respondent in issuing Exh. P2 did not act *ultra vires* his powers. Had he done what the Appellant has been all along pressing for, he would not have escaped being condemned for violating the Treaty and the Staff Rules.
87. For the foregoing reasons, we hold that all things being equal, we would have answered both limbs of the issue framed for determination in this Appeal in the affirmative and allowed the Cross-Appeal with costs, had we been convinced that the Claim was competent.
88. All said and done, we dismiss the Appellant's Appeal in its entirety and allow the

Cross-Appeal with full costs in this Court and in the First Instance Division.

It is so ordered.

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East African Court of Justice - Appellate Division
Reference No. 1 of 2014

**Alcon International Limited And Standard Chartered Bank of Uganda, The Attorney General of Uganda on Behalf of Republic of Uganda, The Registrar of the High Court of Uganda**

L. Nkurunziza, VP; J. M. Ogoola, E. Rutakangwa, JJA
July 27, 2015

*Balancing between the costs claimed and the services rendered - Discretion of a Taxing Officer- Principles governing instruction fees- Applicant has the onus to show the application of wrong principles.*

*Rules: 113 (3) 114, Rule 9(2) of the Third Schedule, of the East African Court of Justice Rules of Procedure, 2013*

This matter arose from Reference No of 6 of 2010 where they sought the Trial Court's interpretation and application of Articles 27(2) and 151 of the Treaty, and Articles 29(2) and 54(2) (b) of the East African common Market Protocol on the regarding the enforcement and enhancement of trade, and the resolution and settlement of disputes for the protection of cross-border investments. The Reference was struck out with costs as being improperly before this Court as against all the Respondents, and was struck out with costs. Appeal No. 2 of 2011 was then filed and the Appellate Court substantially allowed the Appeal with costs and set aside the Ruling of the Trial Court. Thereafter, Taxation Cause No.1 of 2013 was filed and decided by the Taxing Officer. Being dissatisfied with the amount awarded of USD 17,000, the Applicant brought this Reference alleging that the taxing office had improperly exercised their discretion in taxing and that the resulting decision was unjust. The Respondents submitted that the Appellant's claim of USD 2,827,130.00 for instruction fee was exorbitant as the work involved in the Appeal was not complex.

**Held:**

1) What should be allowed in taxing costs, is what is fair and reasonable in the circumstances of each particular case, so as to avoid the risks of confining access to justice to the wealthy.
2) A Taxing Officer has full discretion in taxation matters. A court hearing a reference against a ruling involving the exercise of a Taxing Officer's discretion, will not normally interfere with the ruling merely because it thinks it would have awarded a different figure as taxation of costs is not a mathematical exercise but a discretionary process.
3) Interference by the court would only be justified where there is proof that either the amount taxed was manifestly excessive or so manifestly deficient as to amount to an injustice; or the Taxing Officer followed a wrong principle(s).
4) The Applicant failed to show, even on a balance of probabilities, where and how the

learned Taxing Officer took into consideration wrong principles, or applied wrong considerations.

**Cases cited:**

Bank of Uganda v Banco Arabe Espanol, Civil Application No. 29 of 1999 (USC)
Irish Independent Newspaper Ltd v. Irish Press Ltd. [1939] I.R. 371 or 73 I.L.T.R. 177
Makumbi and Another v. Sule Electric (U) Ltd. (1990 – 1994) E.A 306
Modern Holdings (EA) Ltd v. Kenya Ports Authority, EACJ Reference No. 1 of 2009
Mukisa Biscuit Manafucturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696
Premchand Rainchand v. Quarry Services of East Africa [1972] E.A 162
The Attorney General v Amos Shavu , Court of Appeal of Tanzania, Taxation Reference No. 2 of 2000
Thomas James Arthur v. Nyeri Electricity Undertaking (1969) E.A. 492
Smyth v. Tunney (1993) 1 I.R.451

**Judgment**

1. This Reference by Alcon International Limited ("the Applicant"), emanates from the decision of the Court's Taxing Officer in Taxation Cause No. 1 of 2012. The Reference is made under Rule 114 of the East African Court of Justice Rules of Procedure, 2013 ("the Court Rules"). The Appellant is challenging the Ruling of the Taxing Officer in which it was awarded USD 17,000 as instruction fees, as opposed to the claimed USD 2,827,130.00 plus 16% VAT.
2. The matter giving rise to this Reference is admittedly long, but not complex. It is as follows.
3. The Applicant is a construction company incorporated and registered in the Republic of Kenya. The 1st Respondent is a limited liability company registered in the Republic of Uganda wherein it carries out banking business. The 2nd and 3rd Respondents are public servants in the government of the Republic of Uganda.
4. Pursuant to the provisions of Articles 27 (2) and 151 of the Treaty for the Establishment of the East African Community ("the Treaty") and Articles 29 (2) and 54(2) (b) of the Protocol on the Establishment of the E. A. Community Common Market ("the Protocol"), the Applicant had made a Reference (vide Reference No. 6 of 2010) to this Court's First Instance Division ("the Trial Court") seeking, *inter alia*, the following:
   (a) The Court's interpretation and application of Articles 27(2) and 151 of the Treaty, read together with Articles 29(2) and 54(2) (b) of the Protocol on the enhanced Jurisdiction of this Court as a competent judicial authority regarding the enforcement and enhancement of trade, and the resolution and settlement of disputes for the protection of cross-border investments;
   (b) A declaration that the signing and coming into force of the Protocol, enhanced the Jurisdiction of this Court as envisaged under Article 27(2) of the Treaty as a competent judicial authority for the determination of cross-border trade disputes;
   (c) A declaration that where a public official of a Partner State fails to honour his statutory obligation or duty, 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;

(d) A direction to 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 a Bank Guarantee dated 29th October, 2003; and

(e) General damages to be assessed by the Court.

5. The three Respondents challenged the competence of the Reference, on the following four grounds that:-

(a) the 1st and 3rd Respondents were improperly impleaded;

(b) the Reference was time barred;

(c) the Applicant had no rights under the Protocol in respect of acts which arose prior to the coming into force of the Protocol; and

(d) there were pending proceedings in the Ugandan courts dealing substantially with the same issue raised in the Reference.

6. In its ruling the Trial Court found that there was "overwhelming evidence" before it to prove that there had "been and still are several cases in the courts of Uganda in which the instant Claimant is directly interested" and also aware of.

7. It went on to hold:

"…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."

8. The Reference was accordingly found to be improperly before this Court as against all the Respondents, and was struck out with costs, on that ground alone. The Applicant/ Claimant was dissatisfied and preferred an appeal, i.e. Appeal No. 2 of 2011 ("the Appeal") to this Division of the Court (" this Court").

9. The Appeal was premised on fifteen (15) grounds of complaint. However, at the Scheduling Conference these were condensed into five (5) substantive grounds of appeal. These were to the effect that:-

(a) The Trial Court erred in law in holding 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;

(b) The Trial Court erred in law by failing to make a finding on each preliminary point of objection raised by the Respondents;

(c) The Trial Court misdirected itself and erred in law 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;

(d) The Trial Court erred in law with regard to the interpretation and application of the provisions of the Treaty and of the Protocol by failing to pinpoint which provisions of the Treaty and the Protocol oust the jurisdiction of the Court on the basis of pendency of proceedings in the national courts;

(e) In view of the provisions of Article 33 (2) of the Treaty, the trial Court erred in law by holding, *inter alia*, that:
   (i) it would be absurd to have parallel proceedings in two Courts;
   (ii) a clash of decisions would cause confusion between the Court and the Courts in Uganda;
   (iii) it would result in an execution stalemate.

10. Mr. Fred Athuok, learned advocate, represented the Appellant. The thrust of Mr. Athuok's submission in support of the Appeal was that the trial Court erred in holding that the Applicant was a party in the Uganda Supreme Court Civil *Appeal No. 15 of 2009* between the *N.S.S.F. and W. H. Ssentoogo t/a Ssentoogo and Partner v. Alcon International Limited*, which holding was based on contested factual issues, which could not in law form a basis for a point of preliminary objection. It was his further contention that the Trial Court erred in failing to address the issues of the interpretation of the Treaty and the Protocol; and particularly so the crucial issue of this Court's jurisdiction to entertain the Reference. He, accordingly, urged this Court to step into the shoes of the Trial Court and dispose of the undetermined points of preliminary objection.
11. The Appeal was strongly resisted by the three Respondents. Mr. Barnabas Tumusingize, Learned Advocate for the 1st Respondent, submitted that the Protocol did not extend the Court's jurisdiction to handle disputes arising under that Protocol. He further argued that "there was no rule of law requiring that the trial Court should have addressed all the preliminary points of law raised". It was, also, his contention that the Trial Court was entitled to hold that there were pending proceedings in the Supreme Court of Uganda involving the same parties on a substantially identical issue. On all those points, Mr. Tumusingize was supported by Ms. Patricia Mutesi, Learned Counsel for the 2nd and 3rd Respondents.
12. In its Judgment on appeal, this Court faulted the Trial Court, holding that as the point that there were pending proceedings in the courts of Uganda was a contested issue of fact, it could not constitute a valid point of preliminary objection, as articulated in the case of *Mukisa Biscuit Manafucturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696*. That point of objection which, without doubt, was the sole ground, on which the Trial Court premised its ruling, was overruled.
13. This Court then clustered the remaining grounds of appeal as "*essentially grounds of complaint against the Court's assumption of jurisdiction in the Reference*". In disposing of this combined issue, the Court reiterated what is now trite law to the effect that the issue of jurisdiction being so basic should in all cases "be answered first before proceeding to any other issue." On this, it relied on the case of Owners of the Motor Vessels "*Lillian S" v Caltex Oil (Kenya) Limited [1989] [KLR] and the case of Fanuel Mantiri N'gunda v Herman Mantiri N'gunda and 20 Others (CAT) Civil Appeal No. 8 of 1995 (unreported)*.
14. This Court further ruled that the Trial Court had a duty to decide all the issues that were framed at the Scheduling Conference. It also allowed the fourth ground of appeal reproaching the Trial Court for failing to consider and/or determine the raised issue regarding the interpretation and application of the provisions of the Treaty and Protocol on the alleged ouster of the jurisdiction of the Court on account of there

being "*similar undecided cases in the municipal courts*".

15. Also the Court found that there would be no conflict or confusion between the two sets of proceedings were premised on different causes of action.
16. In summary, therefore, out of the five issues, this Court dismissed only the third ground of appeal as it was not based on a point of law, but was "a question of mixed fact and law."
17. At the end of the day, the Court substantially allowed the Appeal by setting aside the Ruling of the trial Court as it was grounded solely on a point which was not a legally sustainable point of preliminary objection. This fact, notwithstanding, the Court declined "the invitation to assume original jurisdiction and …dispose of the preliminary objections raised by the Respondents" as Mr. Athuok had vigorously pressed. This decision rested on the clear provisions of Articles 23(2) & (3), and 35A of the Treaty, which spell out this Court's jurisdiction. The Appellant was awarded costs, hence Taxation Cause No.1 of 2013 (the Bill of Costs) whose taxation by the Taxing Officer gave rise to this Reference.
18. The Bill of Costs contained 47 items comprising instruction fees (Item No. 1), attendances, disbursements and other related expenses. The total amount claimed was USD 3,328,982.10. Out of this sum, the instruction fee alone was USD 2,827,130.00 plus 16% VAT, making a total of USD 3,279,470.80.
19. Mr. Athuok, going by his 7-page written submissions in support of the Bill of Costs which he wholly adopted in this Reference, chiefly exerted himself in defence of item No. 1. He argued before the Taxing Officer that having filed and presented the Record of Appeal, he had argued extensively in the Appeal on, among others, the following: "Whether the First Instance Division exercised its role correctly or at all, in failing to interpret and apply the Treaty…as read together with Articles 29 (2) and 54(2) (b) of the Protocol…on the enhanced jurisdiction of the Court as a competent Judicial Authority with regard to the enforcement of the resolution and settlement of trade disputes, the protection of cross border investments and the legality of striking out prayers seeking *inter alia* orders of the court to direct the respondent jointly and/or severally to pay the Claimant/Appellant the decretal sum of US$8,858,469.97 together with interest at Court rates from 29th March 2001 and costs in full as undertaken by the first Respondent under the Bank Guarantee dated 29th October, 2003 pursuant to Arbitral proceedings and Award of 29th March 2001 and subsequent order of the Uganda Court."
20. Mr. Athuok further contended that the sum of money involved in the matter (i.e. an Award of USD 8,858,469.97), is quite substantial, and that the proceedings in this Court involved numerous processes, adding that "the volume and magnitude of documentary evidence was great", and they "had to carry out substantial, serious and involving research work on the matter", given the fact that "this is a new era in the commercial dispute resolution mechanisms within the EAC and enhanced jurisdiction of the Court." He pointedly asserted that "the absence of developed jurisprudence on the subject in the region made the task even more challenging." For these reasons, and relying on the case of *In the Matter of Kenya Representative to the East African Legislative Assembly, Taxation No. 6 of 2008*, Mr. Athouk contended that the sum claimed as instruction fees was "*very reasonable*" and urged Taxing Officer

to grant it as presented.

21. Evidently, the ingenuity of Mr. Athouk did not melt the hearts of Counsel for the three Respondents. They strongly contended before the Taxing Officer that the claim of USD 2,827,130.00 was "excessive, exorbitant and not reasonable". They predicated this stance on their belief that the issue under scrutiny and the work involved in the Appeal were not complex. They accordingly pressed for the amount claimed under this head to be reduced to USD 15,000.
22. In her ruling, the learned Taxing Officer remained alive to her statutory discretion which was to be exercised in accordance with what was reasonable and fair in the circumstances of the case. More commendably, she relied on the Judgment of the First Instance Division of this Court in *Taxation Reference No. 4 of 2010: Kenya Ports Authority vs. Modern Holdings EA Ltd*, in a bid to fairly and justly determine the Bill of Costs. In particular she relied, in that judgment, on the following instructive passage;-

    "The bottom line in my judgment, is that the cost of doing business in this Court should be as far as possible kept to a level that is reasonable, affordable and that should not deter any citizen of East Africa from seeking justice from this Court, and at the same time be proportionate for the purpose of remunerating the advocate…"
23. We wholly subscribe to this holding. Indeed, it would be futile to have court houses whose thresholds cannot be crossed by all save only the exceptionally rich. If only the rich can do so, then our courts would cease to be courts of justice. They would turn instead into shrines of commerce for the financially well-heeled. Guided by this fundamental principle and the particular facts of the case, the learned Taxing Officer taxed Item No. 1 on instruction fees at USD17,000, without VAT. The Applicant was aggrieved by this award, hence this Reference.
24. The Reference application contains 19 paragraphs. The more pertinent paragraphs read as follows:-

    "8. The Applicant herein filed and argued the substantive Appeal and Judgment was delivered by the Appellate Division on 16th March 2012 thereby reinstating the Reference and the Applicant was awarded costs. ....
25. The value of the subject matter was substantial. The Applicant was seeking to recover an Arbitral Award of USD 8,858,469.97, together with interests from March 2001 until full payment.
26. The parties involved include the Applicant, a leading construction company in East African Community, leading international and local banking institution, the judiciary and the Attorney General of the Republic of Uganda.
27. There were complex issues involving interpretation of the Treaty, the Protocol together with the Vienna Convention on the Law of Treaties.
28. In their submissions, the Respondent offered USD 15,000 on instructions fees to the Applicant.
29. The Registrar delivered a Ruling on 28th April 2014 awarding the Applicant USD 2,000 above the USD 15,000.
30. The Applicant is aggrieved by the said Ruling of 28th April 2014 and the award of USD 2,000 above 15,000 on instruction fee and files this Reference against the said Award.

31. The Applicant states that the said Ruling violates all the known principles of taxation and as contained in the East African Court of Justice Rules of Procedure 2013 and Rule 9(2) of the Third Schedule of the Rules of the Court with regard to:-
    (a) the amount involved in the matter;
    (b) the nature, importance and complexity of the matter;
    (c) the interest of the parties;
    (d) general conduct of the proceedings; and
    (e) the person to bear the costs.
    (f) The Applicant further avers that the said Ruling was in breach of Rule 9(4) of the Third Schedule of the Rules of this Court with regard to scale of fees chargeable for instructions in suits and references."
32. On the basis of these assertions and complaints the Applicant prays that:-
    (i) the Ruling of the Taxing Officer be set aside;
    (ii) the Applicant be awarded USD 3,279,470.80 as instruction fee and VAT as prayed in the Bill of Costs or such other reasonable sum in the circumstances of this matter, as well as costs.
33. From our scrutiny of the grounds in support of the Reference particularly paragraph 16 and prayer (ii) above, as well as Mr. Athuok's submissions, it is obvious to us that the bane of the Applicant is the award of the perceived paltry sum of USD 17,000 as instruction fees. To the Applicant, the award was premised on the Taxing Officer's unjudicial exercise of her discretion. Had she devoted her attention to the Rules, it is contended, she would have taxed item No. 1 of the Bill of Costs as presented by the Applicant.
34. From the Respondents' perspective, the Reference lacks merit. This is grounded on their understanding that the Taxing Officer properly exercised her discretion in her determination of the Bill of Costs and arrived at a fair and just amount for instruction fee. They are of this firm view because: firstly, the Appeal was not a complex one as it was in respect of whether or not the Trial Court had rightly struck out the Reference, and secondly, the claim of USD 8 million being the alleged value of the subject matter, was not relevant in the Appeal. Accordingly, the Respondents pressed for the dismissal of the Reference with costs.
35. After considering the Parties' submissions before the Taxing Officer and her ruling, as well as the grounds of complaint in this Reference, all Counsel at the Scheduling Conference agreed on the following two issues:
    (1) Whether the Taxing Officer exercised her discretion properly.
    (2) Whether the order of the Taxing Officer in awarding instruction fees should be varied and if so to what extent.
36. In disposing of these issues, we have found it apposite to begin by stating what appears to be basic, and on which there was no disagreement at all among Counsel for the Parties. This is that it is trite that a Taxing Officer or Master performs a function of a judicial nature in relation to taxation of costs. That being the case, the Taxing Officer has full discretion in taxation matters, which, of course, must be exercised judicially. It is universally accepted that a Taxing Officer provides an independent and impartial process of assessment of fair and reasonable legal costs which endeavours to achieve a balance between the costs claimed and the services rendered, the end result being

to attract worthy recruits into the legal fraternity – see, *Premchand Rainchand v. Quarry Services of East Africa [1972] E.A 162. However, as was rightly observed in Makumbi and Another v. Sule Electric (U) Ltd. (1990 – 1994) E.A 306 (USC)*, a mere production of a long list of authorities does not necessarily mean that there was protracted research by counsel and that an advocate should not be re-imbursed for what he has not spent.

37. Following the above principles, it is settled law that a court hearing a reference against a ruling involving the exercise of a Taxing Officer's discretion in a taxation cause, will not normally interfere with the ruling merely because it thinks it would have awarded a different figure had it been the one taxing the bill. This is so because taxation of costs is not a mathematical exercise. It is a discretionary process. Interference by the court in that process would only be justified where there is proof that either the amount taxed was manifestly excessive or so manifestly deficient as to amount to an injustice; or the Taxing Officer followed a wrong principle(s) or that the Taxing Officer applied a wrong consideration(s) in coming to his or her decision: see, for instance, *Premchand Rainchand (supra), The Attorney General v Amos Shavu (CAT) Taxation Reference No. 2 of 2000, and Bank of Uganda v Banco Arabe Espanol, Civil Application No. 29 of 1999 (USC)*. In further elaboration, the erstwhile Court of Appeal for East Africa in *Thomas James Arthur v. Nyeri Electricity Undertaking (1969) E.A. 492* succinctly held that:
"Where there has been an error of principle the court will interfere but questions solely of quantum are regarded as matters with which the Taxing Officers are particularly fitted to deal and the court will intervene in only exceptional circumstances."
38. On our part, not wishing to over-egg the pudding, we would quickly add that it is not sufficient to merely allege that the Taxing Officer improperly exercised his or her discretion or that he or she acted upon a wrong principle. As in cases of specific damages or fraud, the complainant/applicant must come out clearly and point out the wrong principle(s) followed and/or demonstrate how the discretion was wrongly exercised.
39. In this Reference, the Applicant is reproaching the Taxing Officer with improperly exercising her discretion in taxing its Bill of Costs ending up with an unjust decision which we are pressed to set aside. Furthermore, the Applicant contended before us that the said decision "violated all known principles of taxation".
40. The Respondents have countered these claims asserting that "the applicant had failed to show how and where the registrar failed to consider or misapplied the principles of taxation." They have accordingly urged us not to interfere with the discretion of the Taxing Officer.
41. We have given these rival submissions the benefit of mature reflection. We must now respectfully confess, more in sorrow than in fear of dismaying anybody that we have found the bare claims of the Applicant to be lacking in cogency.
42. As lucidly submitted by Counsel for the Respondents, the Applicant has indeed failed to show, even on a balance of probabilities, where and how the learned Taxing Officer took into consideration wrong principles, and/or applied wrong considerations. The Applicant had a duty to prove its allegations. It failed to do so. Instead, in support of these allegations, Counsel for the Applicant, regrettably, referred us to his submission

before the Taxing Officer. We have used here the word "regrettably" deliberately. This is simply because we have found the Applicant's submission before the Taxing Officer to be only remotely relevant to the first issue before us. At the time of those submissions, the Taxing Officer was yet to exercise her discretion in determining the Bill of Costs. The Applicant could not, therefore, have said anything on the Taxing Officer's proper or improper exercise of her discretion in those submissions.

43. All the same, we have studied the ruling of the Taxing Officer. We have found it not to be based on warped reasoning. The learned Taxing Officer was objective in her approach. She dealt with each item one after another and taxed them accordingly, each time assigning reasons for her decision. It has not been suggested to us that she was wrong in her decisions, with the exception of her ruling on instruction fees. Even if it had been so urged and proved, that would not *ipso facto* have established an improper exercise of discretion.
44. In discharging judicial functions, mistakes are often made without necessarily abusing judicial discretion. We are accordingly constrained to agree with the submissions of both Counsels for the Respondents that there was nothing in the ruling of the Taxing Officer to suggest that she flouted in any way the known principles to be observed in the taxation of costs. If we may borrow the words of Mr. Tumusingize, Learned Counsel for the 1st Respondent, we would wind up our discussion on this issue confidently asserting that Counsel for the Applicant made bare statements without substantiating the alleged violations. Issue No. 1 is, accordingly, answered in the affirmative.
45. We should begin our canvass of Issue No.2 stating that it must be resolved on the basis of the naked fact that the Appeal was limited to the question of whether the Trial Court was right when it upheld the point of objection that the Respondents had been improperly impleaded. The merits of the Reference were not before the Court as the Trial Court had not yet adjudicated on them. The other issues were raised by the Applicant/Appellant out of excess caution and in its bid to convince this Court to step into the shoes of the First Instance Division and determine the other points of preliminary objection which that Division left undetermined. As we have already shown, this Court declined that invitation. It goes without saying, therefore, that the Bill of Costs related mainly to the Appeal in this Court against that specific ruling. This is also clear from item No. 1 of the Bill of Costs, which in part reads as follows:
"To our professional fees for receiving instructions to act for the claimant in this Appeal being Civil Appeal No. 2 of 2011 … filing this Appeal against the decision of the First Instance Division of the Court in Reference No. 6 of 2010…"
46. That being the case, we pose the question: has good cause been shown by the Applicant to justify our interference with the award of USD 17,000 as instruction fees on the ground that it was manifestly low?
47. Admittedly, the principles governing instruction fees generally in contentious litigations mirror, to a considerable extent, the terms of Rule 9(2) of the Third Schedule to the Rules. This Rule provides as follows:
"The fee to be allowed for instruction to institute a suit or a reference or to oppose a suit or a reference shall be such sum as the Taxing Officer shall consider reasonable, having regard to the amount involved in the reference, its nature, importance and

complexity, the interests of the parties, the other costs to be allowed, the general conduct of the proceedings, the person to bear the costs and all other relevant circumstances."

48. Before delving into the issue further, we have found it unavoidable to point out here that the above referred to Third Schedule was made under Rule 113 (3) of the Court Rules, which reads:
"The costs shall be taxed in accordance with the Rules and scale set out in the Third Schedule for the First Instance Division and Eighth Schedule for the Appellate Division."
49. Unfortunately, however, the Court Rules do not have the Eighth Schedule. In the light of this lacuna, it is our considered holding that the costs of litigation in this Division should be taxed in accordance with the universally accepted principles most of which the above cited Rule 9 (2) takes cognizance of. It will, therefore, be accepted without much ado that Rule 9 (4) of the Third Schedule does not govern this Reference.
50. In determining this issue then, we have remained alive to the fact that there have been in the past different approaches to the determination of instruction fees and the appellate courts have been loath to interfere with a judicial assessment of a reasonable fee by the Taxing Officer on the basis of the principles enunciated earlier on in this Judgment. See, for instance, *Bank of Uganda v. Banco Arab Espanol (supra), and Modern Holdings (EA) Ltd v. Kenya Ports Authority (EACJ) Reference No. 1 of 2009*. The over-arching principle to be discerned from all the case law on the issue is that it is important to bear in mind that what should be allowed in taxing costs, is what is fair and reasonable in the circumstances of each particular case, so as to avoid, among others, the risks of confining access to justice to the wealthy.
51. There is no gainsaying here that these fees in contentious matters are discretionary and account for much controversy as they "can be subjective and are not susceptible of precise calculation", per Gavan Duffy, J. in I*rish Independent Newspaper Ltd v. Irish Press Ltd. [1939] I.R. 371 or 73 I.L.T.R. 177*. Expounding this subject further, at page 373, Gavan Duffy, J. added:
"I feel it is my duty to state that taxation of such items as "instructions for brief" can never be made an exact science or a matter of specialized accountancy; in order to achieve justice it is necessary for the Taxing Master to exercise the discretion given to him in such matters".
52. This view was echoed by Spry, V.P. in *Premchand Raichand Ltd. (supra)*.
53. Much later in *Smyth v. Tunney (1993) 1 I.R.451*, Murphy, J. found himself constrained to note that the practice of relying on the instruction fee is "rough and unscientific". Indeed it is; and we, accordingly, accept these succinct pronouncements as correct and salutary principles. We shall follow them in our judgment. They demonstrate in an objective way the extraordinary difficulties of a Judge in attempting to review an award of instruction fees by a Taxing Officer or Master where no manifest error is demonstrated.
54. The Applicant in this Reference pressed to be awarded USD 2,827,130.00 plus 16% VAT, for reasons that we need not repeat. It was only awarded USD 17,000 by the Taxing Officer. Before reaching this figure, she had reasoned thus:-
"In the course of taxation, the Counsel for the Applicant left it to the discretion of the

Taxing Officer to determine costs to be awarded to their claims. Being the Taxing Officer, I am required to allow costs, charges and disbursements as they appear to me to have been reasonably incurred for the pursuit of justice, while costs which appear to have been incurred unreasonably or extravagantly making the claim extremely high should not be allowed. As I tax this bill of costs I consider the claim of 2,287,130.00 (sic) in Item No. 1 to be on a very high side considering the work and costs that were involved."

55. On our part, we have found no error of law in the above extract. Nor was one pointed out to us by the Applicant. We shall, accordingly, be failing in our duty to render equal justice to all, if we accede to the Applicant's prayer to set aside the award without any apparent good reason to support us.
56. We should conclude our discussion on Issue No. 2 reflecting that Mr. Athuok had pressed us to set aside the award of USD 17,000 as it was unrealistic. He courageously argued that this award did not reflect the value of the subject matter, the "volume and magnitude of documentary evidence", as well as the monumental research carried out as this dispute involves "a new area in the commercial dispute resolution mechanism" in our region.
57. The response of the Respondents was as simple as it was focused. They argued that the claim of USD 2,827,130.00, exclusive of VAT, was an exorbitant one. This is all because the Appeal was not complex and as such its prosecution did not involve the claimed monumental research. What was needed was a fair reimbursement of the successful Appellant for the costs it had incurred, they stressed. Lastly, they argued that the value of the subject matter was not relevant in the Appeal.
58. We are not a shade unsure on the fact that the jurisprudence touching "the enhanced jurisdiction of the Court as a competent Judicial Authority with regard to the enforcement of the resolution and settlement of trade disputes and the protection of cross-border investments" under the Protocol is in its nascent stages. However, we are of the firm view that the law governing preliminary objections is well settled and indeed nearly legendary. This is clearly reflected in this Court's Judgment in the Appeal. The crucial issue in the Appeal was whether or not the Trial Court erred in law in striking out the Reference on the basis of the raised point of objection, which as this Court demonstrated in its judgment, was not a pure point of law. The *Mukisa Biscuit case (supra)* conclusively disposed of this issue and the Appeal. In view of this fact, we are left wondering as to why Counsel for the Applicant had to expend his resources collecting a "magnitude of documentary evidence" and carrying out "substantial, serious and involving research work" to reach at the principle reported in the *Mukisa Biscuit case* in order to discover that the point relied on by the Respondents and the trial Court, in the particular circumstances of this case, was not legally sustainable. Indeed, our study of the proceedings on appeal in this Court and the Judgment has fortified this position. The determinative case of *Mukisa Biscuit,* was not even cited by Counsel for the Appellant to bolster his argument.
59. We are aware that the other germane issue the Court had to contend with was the legal issue of the Trial Court having failed to resolve the issue whether it had jurisdiction to entertain the Reference. In its Judgment, this Court unequivocally held that "The requirement that jurisdiction be established as a threshold matter is very basic".

Again, in our respectful opinion, to successfully argue in support of this point did not call for a mind-taxing research nor the collection of massive documentary evidence. Our jurisprudence in East Africa is replete with many decided cases on the issue, as can be gathered from this Court's Judgment.

60. In his bold attempt to convince us to agree with his contention that the amount awarded as instruction fees was manifestly low, Appellant's Counsel invited us to draw inspiration from the case of *In the Matter of Kenya Representative to the East African Legislative Assembly, Taxation Cause No. 6 of 2006* in which instruction fees was taxed at USD 1,508,000. He notably stated:
"Unlike the above case which did not involve a liquidated sum, the subject matter in our appeal is an Arbitral Award of USD 8,858,467.97 with interest at court rates from 29th March, 2009".
61. While out of deferment to him we are not prepared to say that this was an outright distortion, we are enjoined to say that the comparison is far-fetched, for as we have already held, the merits of the Reference in the Trial Court were not under scrutiny in the Appeal. The value of the subject matter, therefore, was absolutely not a live issue.
62. The above observation notwithstanding we may as well go further and share the observations made by O'Caoimh, J. in Doyle v. Deasy & Co. dated March 21st, 2003 (unreported) that comparing different cases can be a useful means of determining instruction fees, subject to the following caution:-
"With regard to the use of comparisons, neither I nor any of the judges who have addressed the area of comparative evidence in the area of Taxation, suggest a slavish approach to the adoption of the same. As the area involved is not an exact science and it is probable that few if any cases will be exactly the same, comparators must only be a guide to the assessment in question. However, I am satisfied that they are a most valuable guide."
63. We are in agreement with the above salutary observation and we cannot find better words to improve on its language. In the case under discussion, appellant's Counsel, unfortunately, invited us to follow the case cited by him slavishly without specifying any principle to be gathered therefrom to justify our award of USD 2,827,130.00, an amount vigorously challenged by the Respondents for being not commensurate with the work done by counsel in an appeal which was not complex.
64. Applying all the above principles to the established facts in this Reference, we are of the firm view that indeed the amount claimed as instruction fees was not only "*exorbitant and unreasonable*" as pressed by counsel for the Respondents, it was also an extravagant claim. Acceding to such a claim, for the work done in the Appeal, would be tantamount to setting a principle effectively barring the less financially privileged from accessing this Court of justice. As the Appeal was, in our considered opinion, not a complex one and the subject matter of the main Reference was not a factor for consideration in the assessment of instruction fees, we are of the settled minds that the amount of USD 17,000 was neither unreasonable nor manifestly low as to shake the conscience of any reasonable man or woman. Accordingly, we:
(i) Uphold the Taxing Officer's assessment and leave it undisturbed;
(ii) Dismiss this Reference with costs to the Respondents.

It is so ordered.

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East African Court of Justice – First Instance Division
Application No. 5 of 2015

Arising from Reference No. 2 of 2015

**East African Civil Society Organisations Forum (EACSOF) And Attorney General of Burundi, Commission Electorale Nationale Independente (CENI) Secretary General, East African Community**

Monica K. Mugenyi, PJ; Isaac Lenaola, DPJ; Fakihi A. Jundu, J
July 20, 2015.

*Discretion - Interim Orders- Reasons for decision reserved for delivery on notice.*

*Article 39 of the EAC Treaty - Rules: 21, 68(2) and (3) of the EACJ Rules of Procedure, 2013*

The Applicant sought interim orders staying a decree setting dates for Presidential and Senatorial Elections in Burundi, pending the hearing and determination of the Reference. They averred that democracy, the rule of law, good governance and transparency would be compromised if the incumbent President ran for a third term in office as they claimed that this was unconstitutional.

**Held:**

Taking into account that fact that the Presidential Election were scheduled on 21st July 2015, a day after the hearing of the application, the Court found it was neither judicious nor desirable to issue the orders sought.
Given the time constratinsts, the Court also invoked its discretionary powers to pronounce the reasons for its decision at a later date.

**Ruling**

1. On 6th July 2015 the Applicant filed Reference No. 2 of 2015 EACSOF vs. Attorney General of Burundi and 2 Others, as well as the present Application before this Court.
2. The Application sought interim orders pending the hearing of Reference No. 2 of 2015. It specifically sought orders for the stay of Decree No. 100/177 of the 9th June 2015 that postponed the Presidential and Senatorial Elections to 15th and 24th June 2015 respectively, as well as the decision of the Second Respondent dated 12th June 2015 that apparently approved the nomination of Mr. Pierre Nkurunziza as a candidate in the Presidential Election. The Application further sought an order directing the Second Respondent and the Government of the Republic of Burundi to postpone the Presidential and Senatorial Elections.
3. The Application is *inter alia* premised on the grounds that, in the absence of interim orders, Mr. Pierre Nkurunziza would run for a purportedly unconstitutional 3rd term of office, yet the procedure used by the Second Respondent to accept his nomination ran afoul of the Constitution of Burundi and the Arusha Peace and Reconciliation

Agreement for Burundi, 2000.

4. On 14th July 2015, the Application was heard ex parte but the Court declined to grant the Orders sought. It transpired that the Burundi Presidential Election had been postponed to 21st July 2015 therefore the Court did *inter alia* order that the Application be heard inter partes today.
5. The grant of interim orders before this Court is governed by Article 39 of the Treaty for the Establishment of the East African Community as read together with Rule 21 of the East African Court of Justice (EACJ) Rules of Procedure. Article 39 reads:
   "The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. …."
6. Rule 68(2) and (3) of the same Rules mandates this Court to deliver its decision and not the reasons therefor upon the close of a hearing. It reads:
   "(2) At the close of the hearing the Court may give its judgment at once or on some future date which may be appointed then or subsequently notified to the parties.
   (3) The Court may, in any particular case, direct that only the decision of the Court and not the reasons for it shall be delivered in Court. The reasons for judgment shall be delivered on a date to be notified by the Registrar to the parties."
7. Given the time constraints, the Presidential Election having been scheduled for tomorrow 21st July 2015, we do hereby exercise our discretion to invoke the provisions of Rule 68(3) of the EACJ Rules and pronounce our decision in the present Application while reserving our reasons therefor to be delivered upon notice to the Parties.
8. We have carefully scrutinized the pleadings that were filed in this Application. We did also carefully listen to Learned Counsel for the Applicant and First Respondent herein. In our considered view, it is neither judicious nor necessary or desirable to issue the interim orders sought in this Application. We would therefore disallow the Application.

It is so ordered.

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East African Court of Justice- First Instance Division
Application No.5 of 2015

Arising from Reference No. 2 of 2015

**East African Civil Society Organisations Forum (EACSOF) And Attorney General of Burundi, Commission Electorale Nationale Independente (CENI) and the Secretary General East African Community**

Monica Mugenyi, PJ; Isaac Lenaola, DPJ; & Fakihi A. Jundu J
July 29, 2015

*Burundi Presidential and Senatorial elections- Interim injunction -Judicial discretion – Whether a prima facie case had been established.*

*Articles: 9(4), 23(3), 27(1) 30(3) of the Treaty for the Establishment of the East African Community.*

The Applicant is a body bringing together Civil Society Organisations in East Africa. On 6th July 2015, the Applicant filed Reference No. 2 of 2015 seeking: a stay of Decree No. 100/177 of the 9th June 2015 that postponed the Presidential and Senatorial Elections in Burundi to 15th and 24th June 2015 respectively; a stay of the Second Respondent's decision dated 12th June 2015 that approved the nomination of Mr. Pierre Nkurunziza as a candidate in the Presidential Election; and an Order directing the Second Respondent and the Government of the Republic of Burundi to postpone the Presidential and Senatorial Elections. In this Application the applicant sought interim orders claiming serious questions on democracy, the rule of law, good governance and transparency if no action was taken, as President Nkurunziza would run for an unconstitutional third term in office.

The First Respondent questioned the intentions of the Applicant arguing that Communal and Legislative Elections had already been held in accordance with Decree No. 100/177, therefore, the prayer for a stay of the Decree was superfluous and the Applicant had not established a prima facie case warranting the granting of the orders.

**Held:**

1) That Reference No. 2 of 2015 raised no matters of Treaty interpretation or serious questions for determination by the Court.
2) The Applicant had not established the injury it stood to suffer if interim orders were not granted and whether such alleged injury could not be adequately compensated by damages.
3) The Applicant had not demonstrated that the postponement of the Presidential Election would stem the civic disorder and unrest being experienced in Burundi. And in totality of the circumstances of the case, stopping the Election at this stage

would occasion injury to the rights of the Burundi citizenry.

4) The inconvenience likely to be suffered by the Applicant in the event that the injunction is not granted, negated the corresponding obligation to protect the Burundian people against the violation of their constitutional right to timely elections and the constitutional duty of the First and Second Respondents to organize the said Elections.

**Cases cited:**

American Cyanamid v Ethicon Ltd (1975) AC 396

Attorney General of Kenya v The Independent Medical Legal Unit EACJ Appeal No. 1 of 2011

E. A. Industries vs. Trufoods [1972] EA 420

Samuel Mukira Muhochi v The Attorney General of the Republic of Uganda, EACJ Ref. No. 5 of 2011

**Ruling**

1. The Applicant, East African Civil Society Organisations Forum (EACSOF), is a platform for Civil Society Organisations in East Africa that seeks to build 'a critical mass of knowledgeable and empowered civil society in the region in order to foster their confidence in articulating grassroots needs and interests to the EAC (East African Community) and its various organs, institutions and agencies.' On the other hand, the Second Respondent is the body responsible for conducting national elections in Burundi. The First and Third Respondents are self-defining.
2. On 6th July 2015, the Applicant filed Reference No. 2 of 2015 EACSOF vs. Attorney General of Burundi and 2 Others, as well as the present Application before this Court. The Application sought interim orders pending the hearing of the Reference. It specifically sought Orders for the stay of Decree No. 100/177 of the 9th June 2015 that postponed the Presidential and Senatorial Elections to 15th and 24th June 2015 respectively, as well as the stay of the Second Respondent's decision dated 12th June 2015 that apparently approved the nomination of Mr. Pierre Nkurunziza as a candidate in the Presidential Election. The Application further sought an Order directing the Second Respondent and the Government of the Republic of Burundi to postpone the Presidential and Senatorial Elections.
3. The Application was *inter alia* premised on the following grounds:
   a. The situation in Burundi required urgent attention.
   b. If no action was taken, President Nkurunziza would run for an unconstitutional third term of office.
   c. The procedure used by the Second Respondent in arriving at the decision to submit and accept the candidacy of President Nkurunziza ran afoul of the Constitution of Burundi and the Arusha Peace and Reconciliation Agreement for Burundi, 2000 (hereinafter referred to as 'the Arusha Peace Agreement'), both of which limit Presidential office in Burundi to two (2) terms.
   d. It is therefore imperative that the interim orders sought be granted as the Reference raised serious and fair questions for democracy, the rule of law, good governance and transparency, the erstwhile people (presumably of Burundi) continued to

suffer and their suffering could not be quantified or appeased by damages, and the balance of convenience lay in favour of allowing the main Reference.

e. It was in the best interests of justice that the orders sought be granted.

4. On 14th July 2015, the Application was heard *ex parte* but the Court declined to grant the Orders sought for the following reasons. First, Decree No. 100/177 of the 9th June 2015 by President Nkurunziza, as well as the Communique by the Second Respondent dated 12th June 2015, both of which were principally in issue in the Application were submitted in French and no English translations thereof had been availed to the Court. This was deemed to contravene the provisions of Article 137(1) of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty'), which prescribes English as the official language of the Community. Indeed, Article 46 of the Treaty explicitly designates English as the official language of the Court. Secondly, and perhaps more importantly, when the Court sat on 14th July 2015 it transpired that the Burundi Presidential Election had been postponed to 21st July 2015 therefore the urgency that presumably underscored the Application for *ex parte* interim orders no longer prevailed. It was, therefore, ordered that the Application be heard *inter partes* on 20th July 2015.
5. At the hearing of the Application *inter partes*, the Applicant was represented by Mr. Donald Deya, while the First Respondent was represented by Mr. Nestor Kayobera. The Second and Third Respondents did not make any appearances, the latter reportedly having instructed Mr. Kayobera that he would abide by the Court's decision in the Application. Upon hearing the parties that were represented at the hearing hereof, this Court did deliver a summary Ruling dismissing the Application and reserved reasons therefor to be given on notice to the Parties. This course of action is duly provided for in Rule 68(3) of the East African Court of Justice Rules of Procedure (hereinafter referred to as 'the Court's Rules'). We do hereby deliver our reasoned Ruling in this matter.
6. In a nutshell, it was argued for the Applicant that the Application disclosed a *prima facie* case in so far as the implementation of a Constitutional Court decision by the First and Second Respondents constituted a violation of the Constitution of Burundi and the Arusha Peace Agreement, and therefore, the Treaty. Mr. Deya did also argue that attempting to hold the Presidential Elections as scheduled may lead to a further deterioration of the security situation in Burundi and the wider East African Community (EAC), and the irreparable damage and harm accruing therefrom could not be adequately compensated by damages. Finally, on the balance of convenience, learned Counsel contended that whereas the First and Second Respondents only stood to suffer the inconvenience of a delayed election, which they had already postponed on several occasions anyway; the people of Burundi, as well as the greater EAC region were likely to suffer absence of rule of law, peace and security.
7. Conversely, the First Respondent argued that Communal and Legislative Elections had already been held in accordance with Decree No. 100/177 of the 9th June 2015 and, therefore, the prayer for the stay of that Decree was superfluous and, in any event, Article 39 of the Treaty entreated the Court to grant interim orders or issue directions that it considered necessary or desirable, but the orders sought in the present application were neither necessary nor desirable. Citing this Court's decision

in *Timothy Alvin Kahoho vs. Secretary General of EAC & Another Application No. 5 of 2012* that the discretion to grant or refusal of an injunction must be exercised judiciously, the main purpose of a temporary injunction being to maintain the status quo; Mr. Kayobera questioned the intentions of the Applicant, wondering whether it wished to maintain the current status quo in Burundi of insecurity, anarchy and chaos. On that premise, learned Counsel contended that the Applicant had not established a *prima facie* case herein. Mr. Kayobera did also argue that an award of damages could compensate any purported injury suffered by the Applicant, but questioned the injury the Applicant stood to specifically suffer in the event that President Nkurunziza was re-elected President of Burundi. Finally, on the balance of convenience, learned Counsel cited the following decision in *Timothy Alvin Kahoho (supra)* in support of his view that stopping the election process in Burundi at this stage would occasion more injury to the citizens of Burundi and East Africa that the Applicant purported to represent:

"Above all, when the totality of circumstances of the case are examined, we find that stopping the process at this stage would in our view occasion more injury to the citizens of East Africa whom the Applicant purports to be fighting for since a substantive sum of tax payers money has already been spent on the process. As we stated earlier, the Applicant seems to be challenging the procedure not the substance of the directives in question. We are accordingly of the considered view that the balance of convenience favours the Respondent."

8. In a brief reply, Mr. Deya reiterated his earlier position that this Court does have the jurisdiction to entertain the issues raised in the present Application, as well as the Reference in respect of which it arose. Learned Counsel did also acknowledge that one Janvier Bigirimana, a deponent of an affidavit in support of the Application, was indeed a member of the Applicant entity. Finally, Mr. Deya distinguished the case of *Timothy Alvin Kahoho (supra)*
9. As cited by learned Counsel for the First Respondent from those in the present Application in so far as the Applicant in that case had challenged the procedure leading to the decisions that were in issue therein, which was not the case presently.
10. The grant of interim orders before this Court is governed by Article 39 of the Treaty as read together with Rule 21 of the Court's Rules of Procedure. Article 39 reads:
"The Court may, in a case referred to it, make any interim orders or issue any directions which it considers necessary or desirable. …."
11. In the case of *Prof. Peter Anyang' Nyongo & 10 others vs. The Attorney General of the Republic of Kenya & 3 others, Ref. No. 1 of 2006*, the Court relied on the following dictum from *Giella vs. Casman Brown (1973) EA 358 (CA)* to define the parameters for consideration in the grant or refusal of interim orders in the EAC jurisdiction:
"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E. A. Industries vs. Trufoods [1972] EA 420*)."

12. On the other hand, the case of *American Cyanamid vs. Ethicon Ltd (1975) AC 396* underscored the need for a court considering an application for temporary relief to be satisfied that the claim was not frivolous or vexatious but, rather, presented a serious question to be tried; without necessarily delving into the determination of a prima facie case, an exercise that could entail the resolution of questions of law and/or fact upon which the substantive suit hinges. This position is reflected in *Halsbury's Laws of England, Vol. 11 (2009), 5th Edition*, para. 385, and was cited with approval by this Court in the case of *Mbidde Foundation & Another vs. Secretary General of the East African Community & Another Consolidated Application No. 5 & 10 of 2014*.
13. In the present Application, it was strongly argued for the Applicant that the Constitutional Court of Burundi misinterpreted the Constitution of Burundi, as well as the Arusha Peace Agreement and, therefore, the Second Respondent's acceptance of Mr. Nkurunziza's nomination as a Presidential Candidate on the basis of the erroneous court interpretation was in contravention of the said legal instruments. It was posited that, to the extent that Mr. Nkurunziza's nomination thus contravened the prevailing legal regime in Burundi, it contravened Articles 5(3)(f), 6(d), 7(2), 8(1)(a) and (c), and 8(5) of the Treaty. We understood Mr. Deya to advance two (2) positions; first, that the decision of the Constitutional Court was itself in issue within the precincts of Article 30(1) of the Treaty and, secondly, he equated the said court decision to an 'action' attributable to the First Respondent within the purview of the same provision of the Treaty. Both positions go to the question of the jurisdiction of this Court in this matter.
14. Conversely, in response to a question from the Bench on this issue, it was Mr. Kayobera's contention that this Court did not have jurisdiction to review or inquire into a decision of a National Court as this was, in his view, expressly prohibited by Article 30(3) of the Treaty. Article 30(3) of the Treaty reads:
"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."
15. We have carefully considered the provisions of Article 30(3) of the Treaty. That legal provision negates the jurisdiction of the Court over matters that have been reserved under the Treaty to an institution of a Partner State. Whereas the Treaty does not expressly reserve the business of national courts as one of those matters over which this Court has no jurisdiction, we find that Articles 9(4) and 27(1) are quite instructive on the intention of the framers of the Treaty on this issue. We reproduce the said articles below for ease of reference.
"Article 9(4):
The organs and institutions of the Community shall perform the functions, and act within the limits of powers conferred upon them by or under this Treaty.
Article 27(1):
The Court shall have jurisdiction over the interpretation and application of this Treaty."
16. We do recognize that it is no part of this Court's function while considering an interlocutory application to determine intrinsic questions of law which call for detailed argument and detailed considerations; those are matters to be dealt with at

the hearing of the substantive Reference. See *American Cyanamid vs. Ethicon Ltd (supra)*. Accordingly, subject to more detailed consideration of these points of law at the hearing of the Reference, at this stage we find that a purposive interpretation of the foregoing legal provisions would prima facie support the preposition that this Court's jurisdiction is restricted to matters of Treaty interpretation. Therefore, by exclusion, the Court would have no jurisdiction to entertain a matter of constitutional interpretation.

17. With specific regard to the present application, it would appear that this Court has no jurisdiction to interpret the provisions of the Burundi Constitution or Arusha Peace Agreement for purposes of determining the correctness of the Burundi Constitutional Court's decision, as appears to be the thrust of the present application. That is entirely different from the Court reviewing the provisions of a Partner State's national law with a view to determining its compliance with the Treaty. This Court has explicitly pronounced itself on having jurisdiction to entertain the latter scenario. See A*ttorney General of Kenya vs. The Independent Medical Legal Unit EACJ Appeal No. 1 of 2011 and Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011*.
18. In the same vein, this Court is not clothed with appellate jurisdiction over the decisions of national courts. Article 23(3) of the Treaty specifically designates it as a Court of First Instance in matters of Treaty interpretation.
19. Without prejudice, therefore, and subject to more intrinsic arguments at the hearing thereof, we are not persuaded that Reference No. 2 of 2015 raises matters of Treaty interpretation. To that extent, we are not persuaded that the said Reference raises serious questions for determination by this Court. However, we would not go so far as to hold that we have been satisfied to the required standard of proof by either party's position on this issue. We do, therefore, deem it necessary to determine the questions of irreparable injury and balance of convenience.
20. The decision in *E. A. Industries vs. Trufoods [1972] EA 420* that was referred to in *Giella vs. Casman Brown (supra)* is quite instructive in this regard. In that case, it was held (Spry VP):

    "There is, I think, no difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages."
21. A common thread in the Applicant's case was that the situation in Burundi was dangerously perilous hence the need for urgent intervention, and if Mr. Nkurunziza ran for another term in office the situation would degenerate and occasion untold suffering to the Burundian and EAC citizenry. This argument was advanced as demonstration of the irreparable injury that the Burundian people stood to suffer, as well as in support of the notion that the balance of convenience in this matter lay with the Applicant, as a representative of the people of Burundi. However, learned Counsel for the First Respondent appeared to contest that position and attributed the insecurity and civic disorder in Burundi to some of the Applicant's members,

including Mr. Janvier Bigirimana. Learned Counsel questioned the injury the Applicant specifically stood to suffer in the event that this Application was disallowed.

22. We note that Mr. Kayobera's question as to the specific injury the Applicant stood to suffer remained unanswered. Similarly, the Applicant did not rebut the First Respondent's submission that some of the Applicant's members were fanning the civic disorder in Burundi. In his reply, learned Counsel for the Applicant simply acknowledged Mr. Bigirimana as an official in the Applicant entity. In any event, we were not satisfactorily addressed on the issue of whether or not whatever injury the Applicant was likely to suffer could not be adequately compensated by damages. Consequently, we find that the Applicant has not sufficiently demonstrated the irreparable injury it stood to suffer if this Application were disallowed or that the said injury could not be compensated by damages.
23. In *American Cyanamid vs. Ethicon Ltd (supra)*, the objective of interlocutory reliefs was aptly stated as follows (Lord Diplock):
"The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."
24. In the present Application, the Applicant sought to protect the rights of the Burundian and greater EAC region citizenry from the violation of its right to peace, security and stability, as well as good governance, democracy and the rule of law. These rights were depicted in paragraph V of the Application and canvassed in the Applicant's submissions. Indeed, they are also re-echoed in the Prayers in paragraph 52(b) of Reference No. 2 of 2015. On the other hand, we understood it to be the First Respondent's case that the Republic of Burundi enjoys the right to conduct its Presidential and Senatorial Elections as provided by the country's Constitution. This is reflected in paragraphs 11, 20 and 21 of the Affidavit in Reply of Nestor Kayobera dated 16th July 2015, as well as paragraphs 12, 13 and 28 of Mr. Kayobera's submissions before this Court.
25. We have already found above that the Applicant has not established the injury it stood to suffer or whether such alleged injury could be adequately compensated by damages. We do not find any demonstration in this Application, either, that the postponement of the Presidential Election would stem the civic disorder and unrest presently being experienced in Burundi. We are alive to the very real possibility that a postponement of the said Elections could occasion similar or worse civic disorder and unrest. We were not satisfactorily addressed on that issue. In fact, a direct question from the Bench that was put to learned Counsel for the Applicant on this issue remained largely unanswered. We are of the considered view that this question is extremely critical to a determination of the balance of convenience in this matter; a postponement of the First and Second Respondents' constitutional mandate and duty

to organize an Election within the time frame stipulated would only be fettered upon sufficient demonstration by the Applicant that it, or indeed the people of Burundi, stood to suffer greater injury should the Election be so held. This was not established before us.

26. Furthermore, in response to questions from the Bench, learned Counsel for the First Respondent did clarify that the Constitution of Burundi prescribed the holding of the Presidential Election not later than 1 month before the expiration of the term of the incumbent President. He clarified that Mr. Nkurunziza's term of office was due to expire on 26th August 2015, meaning that the Presidential Election had to be conducted at least before 26th July 2015. This submission was not rebutted by learned Counsel for the Applicant. This Court has since confirmed the relevant constitutional provision in that regard to be Article 103 of the Burundi Constitution. We therefore find no reason to disallow the connotation of urgency represented by that submission.
27. Therefore, as this Court did find in *Timothy Alvin Kahoho (supra)*, we find that the totality of the circumstances of this case are such that stopping the Election at this stage would occasion injury to the rights of the Burundi citizenry - that the Applicant purports to be speaking for – to the maxims of rule of law and good governance as enshrined in their National Constitution. Contrary to the assertions of learned Counsel for the Applicant, as quite clearly stated in the grounds of this Application, the Applicant herein did, as in the Kahoho case, take issue with the procedure leading up to the Elections in issue presently. Therefore the decision in that case is quite pertinent to the present Application.
28. In the result, weighing the balance of convenience in this matter, we take the considered view that to exercise our judicial discretion to protect the Applicant's right to security, peace and stability in the absence of satisfactory proof of the injury and inconvenience likely to be suffered by that Party in the event that the injunction were not granted, would negate the corresponding obligation to protect the Burundian people against the violation of their constitutional right to timely elections, not to mention the constitutional duty upon the First and Second Respondents to organize the said Elections as by law provided.
29. Consequently, it is for the foregoing reasons that this Court respectfully disallowed the present Application with no order as to costs.

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