THE EAST AFRICAN COMMUNITY

THE EAST AFRICAN COURT OF JUSTICE
AT ARUSHA

(Coram: Moijo M. ole Keiwua P, Joseph Mulenga VP, Augustino S. L. Ramadhani J, Kasanga Mulwa J, Joseph S. Warioba J)

APPLICATION NO----------1--------OF 2005

1. **CALIST ANDREW MWATELA**
2. **LYDIA WANYOTO MUTENDE----------APPLICANTS**
3. **ISAAC ABRAHAM SEPETU**

VERSUS

EAST AFRICAN COMMUNITY----------RESPONDENT

JUDGMENT

This is a reference under Article 30 of the Treaty for the Establishment of the East African Community (the Treaty), instituted on 7th December 2005 by three Members of the East African Legislative Assembly, namely: Calist Andrew Mwatela, Lydia Wanyoto Mutende and Isaac Abraham Sepetu (the applicants), in an application by Notice of Motion pursuant to rules 1 (2) and 20 of the East African Court of Justice Rules of Procedure (the Court Rules). The respondent is the East African Community which under Article 4 of the Treaty, is a body corporate with *inter alia* power to sue and be sued in its own name.

In their application, the applicants challenge the validity of the meeting of the Sectoral Council on Legal and Judicial Affairs (the Sectoral Council) held on 13th to 16th September 2005 and the decisions taken by the said meeting in relation to Bills pending before the East African Legislative Assembly (the Assembly), and they seek an order by the Court that the report of the Sectoral Council meeting held on 13th to 16th September 2005 is null and void *ab initio* and all decisions, directives and actions contained in or based on it are null and void.

In the response to the application the respondent opposes the application and supports the validity of the Sectoral Council's impugned decisions. Both parties to the application opted to rely on the pleadings and the supporting affidavits and the reports and correspondence which were annexed thereto and so no oral evidence was adduced.

It was common ground that what gave rise to the dispute were four Private Member's Bills, which in November 2004 were pending legislation in the Assembly. The Bills are the East African Community Trade Negotiations Bill (2004) (the Trade Negotiations Bill), The East African Community Budget Bill (the Budget Bill), The East African Immunities and Privileges Bill (the Immunities and Privileges Bill) and The Inter-University Council for East Africa Bill (the Inter-University Council Bill).

The Council of Ministers (the Council) at its 9th meeting held on 24th November 2004, decided that policy oriented Bills such as those that have implications on the Partner States' sovereign interest and on the budgetary aspect of the Community, ought to be submitted to the Assembly by the Council under Article 14 (3) (b) of the Treaty as opposed to being submitted as Private Member's Bills under article 59 of the Treaty. The Council therefore decided to assume responsibility for the four pending Bills for consideration and submission to the Assembly. We were not able to ascertain the extent of

consultation that took place between the Council and the Assembly before the Council decided to assume responsibility over the Bills. But we found out that in November 2004 and again in February 2005, the Chairperson of the Council requested and the Assembly agreed to postpone debate on the Trade Negotiations Bill.

During the budget debate in the May 2005 session of the Assembly, some issues connected with the pending Private Member's Bills were raised as a result of which the Chairperson of Council proposed a joint meeting between the Assembly and the Council. Before that meeting was held, the Council held its 10th meeting on 4th to 8th August 2005, at which it decided that development of legislation on trade negotiation be stayed pending conclusion of a consultancy study into all implications of such legislation, and that the Inter-University Council Bill be submitted to the Sectoral Council for legal input and subsequent submission to the Assembly.

The joint meeting, referred to as the High Level Retreat, was held at Ngurdoto Mountain Lodge on 10th and 11th August 2005. At the conclusion of the meeting, the Chairperson undertook that the revised Inter-University Council Bill and the Immunities and Privileges Bill would be submitted to the Assembly session due to start on 19th November 2005. However the said Bills were not submitted to the Assembly as undertaken by the Chairperson because the Sectoral Council decided otherwise.

The Sectoral Council held a meeting on 13th to 16th September 2005, at which it decided that protocols, within the meaning of Article 151 of the Treaty, rather than legislation enacted by the Assembly, were sufficient to provide for the Inter-University Council and for providing immunities and privileges for the Community. Apparently a Protocol for the establishment of the Inter-University Council was concluded on 13th September 2002, and had been ratified by Tanzania and Uganda and only awaited ratification by Kenya; and a draft

Protocol on immunities and privileges for the Community, its organs and institutions and persons in its service was in process of consultation and had been considered by the Permanent Secretaries in February 2005.

The Sectoral Council observed that the contents of the Bills were respectively similar to the provisions of the said Protocols and accordingly it decided to advise the Council to withdraw the two Bills from the Assembly. In furtherance of these decisions, the Sectoral Council (a) urged that the Ministers of the Partner States responsible for Foreign Affairs should urgently meet to consider and conclude the Protocol on Immunities and Privileges so as to bring it into force by 1st January 2006; and (b) requested that the Chairperson of the Council should inform the Speaker of the Assembly of these decisions.

Two things followed. On 16th September 2005 the Secretary General of the Community wrote to the Speaker informing him, *inter alia*, that the Council had decided to withdraw from the legislative business of the Assembly the Immunities and Privileges Bill and the Inter-University Council Bill. Secondly according to the Official Report of Proceedings of the Assembly, on 27th September 2005, Mr. John Koech, a Member of the Council, apparently on behalf of the Chairperson, made a Ministerial Statement from the floor of the Assembly, recalling the Council decision at its 9th Meeting held on 24th November 2005, to assume responsibility of the four Bills, its subsequent request to the Speaker to defer consideration of the Bills until policy input by the Council had been finalized and also gave an up date to the Assembly on the current position of each Bill.

In a nutshell he said that after receiving comments by the Partner States on the Bills and subjecting the Bills for appropriate policy input by the Sectoral Council, the Council was requesting that development of legislation on trade negotiations be stayed pending conclusion of consultation with Partner States

on a consultancy study report; and that the Community Budget Bill be stayed pending submission of the Partner States' comments on it to relevant Sectoral Committees.

He also disclosed that it was the view of the Partner States that both the Immunities and Privileges Bill and the Inter-University Council Bill be withdrawn from the Assembly because in either case a Protocol within the meaning of Article 151 of the Treaty is sufficient. The Ministerial statement was not well received and after some uncomplimentary reactions, the Assembly resolved to have a substantive debate on the Ministerial statement at sometime in the future. However, no Motion was subsequently moved to initiate a debate on the matter. Instead, on 7th December 2005, the applicants filed this application which the respondent opposed as we indicated earlier.

At the hearing, the applicants were represented by a team of counsel led by Professor F.E. Ssempebwa and consisting of Mr. D.W. Ogalo, Mr. M. Marando, Mr. M.S Kaggwa and Mrs. S.N.Bagalaaliwo while the respondent was represented by a team led by Mr. W. Kaahwa, Counsel to the Community, and consisting of Ms Makena Muchiri, Deputy Chief State Counsel (Kenya), Mr. S.N. Tuimising, Senior State Counsel (Kenya), and Ms Isabelle Waffubwa, Legal Officer of the Community. The East African Law Society, with leave of the Court, appeared in the application as *amicus curiae* and was represented by Mr. Tom Nyanduga, President of the Society, Mr. Don Deya, Chief Executive Officer of the Society, Mr. Alex Mgongolwa and Mr. Nassoro Mohammed who are members of that Society.

THE ISSUES

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

(1) Whether the meeting held between 13th and 16th September 2005 was a meeting of Sectoral Council on Legal and Judicial Affairs as envisaged in the Treaty?

(2) Whether Protocols are legally sufficient in regard to immunities and privileges and for the formal establishment of Inter-University for East Africa Council so as to render the enactment of the Community's Acts for those purposes unnecessary**.**

(3) Whether the Inter-University Council for East Africa Bill 2004 and the East African Community and Privileges Bill 2004 were properly withdrawn from the Assembly.

(4) Whether or not under Article 59 a Member could move in the Assembly the East African Community Trade Negotiations Bill 2004, East African Immunities and Privileges Bill 2004, and the Inter- University Council for East Africa Bill 2004.

(5) Whether the decisions of the Council are binding on the Assembly under Article 16 of the Treaty.

(6) Whether the introduction of a Bill under Rule 64 (5) of the Assembly Rules of Procedure constitutes the initiation of the legislative process under those Rules.

(7) Whether or not the decision taken by the Council at its 10th Meeting held on 4th to 8th August 2005 on the East African Trade Negotiations Bill 2004 is lawful and in accordance with the provisions of the Treaty.

(8) Whether or not the decision taken by the Sectoral Council at its meeting on 13th to 16th September 2005 on the East African

Community Immunities and Privileges Bill 2004 and the Inter-University Council for East Africa Bill, 2004 is lawful and in accordance with the provisions of the Treaty.

(9) Whether the decisions of the Sectoral Council are binding on the Assembly.

(10) Whether the Council followed the rules of the House to withdraw Bills.

(11) Whether the Council met to make the decision that was communicated to the Speaker by the Secretary General.

(12) Whether the decision of the Sectoral Council was consistent with its mandate.

(13) Whether the Sectoral Council on Legal and Judicial Affairs by virtue of their decisions taken on September 13th to 16th 2005 purported to discharge functions bestowed upon the Assembly.

(14) Whether the Council and Sectoral Council on Legal and Judicial Affairs have usurped the powers of the Counsel to the Community, Council of Ministers and the East African Court of Justice as provided under the Treaty.

(15) Whether the decisions of the Council and those of the Sectoral Council curtailed or interfered with the Assembly's functions.

(16) Whether the withdrawal of the Bills by the Council of Ministers as an organ of the Community is subject to the Assembly's Rules.

(17) Whether it is obligatory for Council of Ministers to meet so as to communicate the decisions of the Sectoral Council to the Assembly having directed the Chairperson of the Council through the Secretary General.

(18) Whether the Partner States have the Prerogative on who should attend organ meetings like those of the Council and Sectoral Council.

In their respective addresses to the Court, counsel argued the issues in clusters because they realized, quite correctly in our view, that many of the issues touched on the same or related points. Unfortunately they did not configure the clusters uniformly and so in considering and determining the issues in this judgment we are not able to follow the order counsel followed in addressing the Court. We find it more expedient to consider the issues under the following broad headings:-

(a) Establishment of the Sectoral Council and its meeting of September 2005

(b) Status of the contentious Bills

(c) Relationship of the Council and the Assembly on legislation

The applicants' challenge of the validity of the Sectoral Council is two pronged. First they contend that the Sectoral Council was not established as envisaged under, or in accordance with the provisions of the Treaty. Secondly, they contend that the meeting held on 13th to 16th September 2005 was not a properly constituted meeting of the Sectoral Council. The two contentions are grounded on (a) the provisions of Article 14 of the Treaty; (b) the decision of the Council at its 1st Meeting to set up the Sectoral Council; (c) the attendance list of the meeting of the Sectoral Council held on 13th to 16th September 2005

In his submissions on the composition of the Sectoral Council, Professor Ssempebwa pointed out that the Treaty prescribes membership of the Council to consist of Ministers responsible for regional co-operation in each Partner State "*and such other Ministers of Partner States as each Partner State may determine";* and that under Article 14 , the Treaty empowers the Council to establish "*from among its members"* Sectoral Councils to deal with matters that the Council may delegate or assign to them. He argued that when in its 1st Meeting held on 8th to 13th January 2001, the Council adopted a

recommendation to constitute meetings of Attorneys-General of the Partner States into the Sectoral Council on Legal and Judicial Affairs, it acted ultra vires its said power because it thereby established a body that was not composed of members of the Council.

Professor Ssempebwa further submitted that the Council was not empowered to establish a Sectoral Council from among persons other than its members. He contended that save for the Attorney General of the Republic of Uganda who is designated a Minister under the National Constitution, the Attorney General of the Republic of Kenya and the United Republic of Tanzania are not similarly designated Ministers, and consequently for the purposes of the Treaty those two were not members of the Council.

In the alternative, he submitted that even if it is held that the Sectoral Council was lawfully established, the meeting held on 13th to 16th September 2005 was not a lawfully constituted meeting of the Sectoral Council. He referred to the report of that meeting in which it is indicated that only the Attorney General of Uganda attended in person while the Attorney General of Kenya was represented by the Solicitor General and the Attorney General of Tanzania was represented by the Deputy Attorney-General/Permanent Secretary, Ministry of Justice and Constitutional Affairs, both of whom were clearly not Ministers.

Professor Ssempebwa referred to two principles of interpretation of treaties. One is that the words of a treaty must be given their natural meaning unless that would lead to some unreasonable or absurd result. The other is the principle of effectiveness which is that in interpreting a Treaty the Court must ascertain its objective and give effect to it. He submitted that the objective of the Treaty in creating the Council was to create a strong policy making organ of the Community composed of persons with authority from the Partner States to make binding decisions. The Treaty does not leave room for bureaucrats taking over decision-making at that level.

On the other hand, in his opening address at the hearing, Mr. Kaahwa, the learned Counsel to the Community, while acknowledging that the Treaty is the *grundnorm* of the integration process for the Community, from which all other legal instruments in the Community derive, subsist and draw legality, and whose provisions must be strictly adhered to, stressed that the Treaty establishes a framework of organs and institutions entrusted with specific mandates whose execution must be guided by adherence to the rule of law and the principles of harmonization. He also stressed that the Community functions on basis of consensus as its survival depends on goodwill of the Partner States and harmonious working relationship with the organs and institutions and on their agreeing on all aspects of the Community's development. He urged the Court to have these matters in mind in answering the issues before it.

In the response to the application, the respondent maintains that the Sectoral Council meeting held on 13th to 16th September 2005 was validly convened and constituted and that its decisions are valid. In reply to Professor Ssempebwa's first contention, Mr. Kaahwa argued at length that the Attorneys-General of Kenya and Tanzania fit within the Treaty definition of "Minister" and are therefore potential members of the Council.

In the course of the submissions Mr. Kaahwa as Counsel to the Community informed the Court from the bar that membership of the Council is not static. In practice, the full membership is only ascertainable at the time of meetings, when each Partner State determines its representation depending on the agenda of the particular meeting. He argued that by virtue of Article 13 of the Treaty, each Partner State retains an executive prerogative to designate its representative(s) on the Council in addition to its Minister responsible for regional co-operation. He submitted that the exercise of that prerogative may not be inquired into by the Court and cited the case of **Uganda vs. Commissioner of Prisons ex-parte Matovu [1966] EA 645**.

He also submitted that the prerogative has been preserved by the Council Rules of Procedure made under Article 15 (2) of the Treaty. He maintained that in due exercise of that prerogative, Kenya and Tanzania designated their respective Solicitor-General and Deputy-Attorney-General /Permanent Secretary to represent their Attorneys-General at the meeting of the Sectoral Council, notwithstanding that they are not Ministers.

In our view, Professor Ssempebwa's first contention is a departure from the pleadings in this Reference. Throughout the pleadings what was in issue was the composition of the meeting held on 13th and 16th September 2005. All the averments in part 'A' of the Reference are concerned with the session of the Sectoral Council held on 13th to 16th September 2005. Indeed when the respondent pleaded in paragraph 5 of its Response that the Council had established the Sectoral Council at its 1st Meeting, the applicants retorted in paragraph 3 of their Reply to the Response thus: -

> "With regard to paragraph 5 of the Response, the applicants take note that the Council may have established Sectoral Councils as resolved in pages 28 – 34 of Annex 'A' to the Response. The Applicants aver, however, that the establishment of such Sectoral Council does not touch on the issues raised in the Reference as the individuals who sat on 13th – 16th September 2005 are not members of the Council under Article 14 (3) (i) of the Treaty." (Emphasis supplied).

As a result, issue 1 as framed, expressly relates to that session and we take it that issue 18 also relates to the same session. However, the question whether the Sectoral Council was established in accordance with the provisions of the Treaty is a legal one and was canvassed fully. Therefore, we have to determine it though it did not feature in the pleadings. We agree with the counsel for the applicants that the Council is empowered under Article 14 to establish Sectoral Councils from among its members only. Membership of the Council under the

same Article is restricted to Ministers and the Treaty defines a Minister as follows:

> "Minister" in relation to a Partner State, means a person appointed as a Minister of the Government of that Partner State and any other person, however entitled, who, in accordance with any law of that Partner State, acts as or performs the functions of a Minister in that State;

According to the record of the 1st Meeting of the Council held on 8th to 13th January, 2001 the delegations of the Partner States included their respective Ministers responsible for regional cooperation and several others of divers portfolios. We take it that those other Ministers were the ones each Partner State designated as Members of the Council under Article 13. We note that the delegation of Uganda included the Attorney-General but those of Tanzania and Kenya did not.

It was at that Meeting that the Council agreed to designate the Meeting of the Attorneys-General of the Partner State as the Sectoral Council though there is no indication that the Attorneys-General of Kenya and Tanzania were Members of the Council.

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

Attorney General of Kenya is a Minister as "a person who in accordance with a law of [Kenya] acts as or performs the functions of a Minister in [Kenya]".

So, for purposes of the Treaty the two Attorneys-General, of Kenya and Uganda, are Ministers. However, for the Sectoral Council to be properly constituted it must comprise the representatives of all Partner States. This is underlined by Rule 11 of the Rules of Procedure for the Council of Ministers which provides:

> "The quorum of a session of the Council shall be all Partner States representation."

This must apply to the Sectoral Councils since the decisions of the Sectoral Councils are deemed to be those of the Council of Minister under Article 14(3)(i) of the Treaty.

In the circumstances we find that the establishment of the Sectoral Council was inconsistent with the provisions of Article 14(3)(i). However, since the purported Sectoral Council has been in place from 2001 and by now has, undoubtedly made a number of decisions, which would be unwise to disturb, we are of the considered opinion that this is a proper case to apply the doctrine of prospective annulment. We order that our decision to annul the Sectoral Council shall not have retrospective effect.

We think that the doctrine of prospective annulment which has been applied in various jurisdictions, is good law and practice. See The Court of Justice for European Community in **Defrenne vs. Sabena** [1981] All E. R. 122; US Court of Appeals 5th Circuit in **Linkletter vs. Walker Warden** 381 US [1965] 618; and the Supreme Court of India in **Golak Nath vs. The State of Punjab** [1967] AIR 1643.

As for the second contention by Professor Ssempebwa, we note from Annex 'A' to the Reference, which is a report of the meeting of the Sectoral Council on

Legal and Judicial Affairs held on September 13th – 16th 2005, that the participants were the Attorney-General / Minister of Justice and Constitutional Affairs of Uganda, the Deputy Attorney-General / Permanent Secretary, Ministry of Justice and Constitutional Affairs of Tanzania representing the Attorney-General and the Solicitor General of Kenya also representing the Attorney-General. However, by the Treaty the Partner States bound themselves in Article 13 and 14 to be represented in the Council by their respective Ministers responsible for regional cooperation and other Ministers only and thereby delimited the prerogative of a Partner State in determining its representation on the Council. In the circumstances the decisions in **Uganda vs. Commissioner of Prisons ex-parte Matovu** (supra) is not applicable to the facts of this case.

We note that the Treaty does not provide for the members of the Council or Sectoral Council to be represented at meetings by non-members. We think that this was deliberate to avoid distortion of the elaborate structural hierarchy of representation of the Partner States at the different levels in the organizational framework of the Community. Clearly if members of the Co-coordinating Committee, which reports to Council are allowed to represent members of the Council or the Sectoral Council at their meetings, the objective of separation of functions of the two organs would be defeated.

We therefore do not see any justification for the respondent's attempts to make in roads into the very clear words of Article 13 of the Treaty that, Ministers of the Partner States can appoint persons who are not Ministers to attend meetings of Sectoral Councils or those of the Council purportedly on their behalf. It is not in dispute that the Deputy Attorney-General of Tanzania and the Solicitor-General of Kenya are not members of the Council.

We would also like to dispose of the attempt to confuse the purport of Article 15 (2) of the Treaty by reading into it a stipulation that discretion still remains in the Partner States to send to the meetings of Council and those of Sectoral Councils persons who are not Ministers contrary to the requirement of Article 13 of the Treaty. Article 15 (2) is concerned with meetings of the Council and determination of procedure at those meetings. The Council Rules define the expression "Partner State representatives/representation" to mean a Minister designated to represent such a State in the meetings of the Council. We do not therefore see how Article 15 (2) and the Council Rules can be relied upon to show that there is a discretion still left for the Partner States to send persons who are not Ministers to the Council or Sectoral Council meetings.

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

Before we conclude on this aspect of the case, there is a matter to which we would draw attention that though the composition of the Council is established under Article 13 of the Treaty, the total membership is not readily ascertainable, since it is only the membership of Ministers responsible for regional cooperation which is static and ascertainable. We were informed during

arguments that membership of additional Ministers is determined by the agenda of a particular meeting of the Council. We would have thought that a more transparent way of knowing the composition of Council Members should have been evolved and put in place by now. This is good sense and good law since it will avoid uncertainty which usually degenerates into disputes such this one before the Court.

Having held, as we have, that the meeting was not a lawful meeting of Sectoral Council on legal and Judicial Affairs and that the decisions of the meeting was not a lawful meeting of a Sectoral Council on Legal and Judicial Affairs and that the decisions of the meeting were *ipso facto* invalid, it is unnecessary to consider if the said decisions are consistent with its mandate (issue 12) and binding on the Assembly (issue 9) and whether the Sectoral Council purported to discharge the functions of the Assembly (issue 13) or usurped the powers of the Council, the Court and/or Counsel to the Community (issue 14). We also find that it would be futile to discuss whether the council met and whether it was obligatory for it to meet in order to make the decisions which were communicated to the Speaker by the Secretary General (issues 11 and 17). In any case it is apparent from the affidavit of Amanya Mushega, the then Secretary General, that the decisions he communicated to the Speaker were made by the purported Sectoral Council meeting alone.

We would also recall the fact that the issue as to whether Protocols are legally sufficient to render legislation unnecessary (issue 2) was one of those decisions of the meeting of the Sectoral Council held on 13th to 16th September 2005 which meeting, we have found elsewhere in this judgment, not to have been held as required by the Treaty. In view of that finding, this Court would not like to go into that question of sufficiency or otherwise of Protocols because to do so would be to encroach onto the jurisdiction of the Assembly.

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

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

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

undergone the First Reading, and had in our view, become property of the Assembly.

Accordingly, we see no basis, upon which the view that the four Bills had been taken over by the Council, can be supported because the Treaty has not bestowed any power on the Council to take over Bills without observance of the Assembly Rules and we hold that the only lawful way of withdrawing Bills which have become property of the Assembly, as the four Bills had become, is under Rule 34 of the Assembly Rules which provides for a Motion to be introduced in the Assembly for that purpose. The Motion requirement is because the four Bills which were Private Members Bills; were introduced into the Assembly by means of Motions. In its relevant parts Rule 34 says:

> 34 (1) A motion or an amendment to the motion may be withdrawn at the request of the mover by leave of the House or Committee before the question is put.

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

Issue 5 is whether the decisions of the Council are binding on the Assembly under Article 16 of the Treaty. The issue arose because of the respondent's contention that the decision of Council given pursuant to Article 14 of the Treaty override the bar stipulated in Article 16 thus: "other than the Summit, the

Court and the Assembly within their areas of jurisdictions." The respondent further submitted that because of the all embracing power of the Council under Article 14, the Assembly is bound by the Council decision to withdraw the Bills.

However, the applicants dispute that contention on the basis of Article 49 (1) of the Treaty which is on the Assembly's functions and also drew attention to Article 14 (3) (b) of the Treaty which has as one of the functions of the Council the initiation of legislation; but the Article does not imply that the Council has the power to withdraw Bills at will unless in terms of the Assembly Rules.

Mr. Ssempebwa examined Article 16 of the Treaty which provides that decisions of the Council bind other organs and institutions of the Community "other than the Summit, the Court and the Assembly within their jurisdiction". He emphasized those words which he said are meant to underscore the separate and independent jurisdictions of these organs of the Community. The matter at issue in this respect is withdrawal of Bills which have become the property of the Assembly and therefore within its jurisdiction.

We would like to draw attention to the provisions of paragraph (3) (c) of Article 14 which provides:

> "3. For purposes of paragraph 1 of this Article, the Council shall:
> (a)…
> (b)…
> (c) Subject to this Treaty, give directions to the Partner States and to all other organs and institutions of the Community other than the Summit, Court and Assembly."

We are of the firm view that the combined effect of explicit provisions in Article 14 (3) (c) and Article 16 is dispel any notion that the decisions of the Council albeit on policy issues bind the Assembly in respect of any matter within its jurisdiction.

We think the interpretation of Article 16 of the Treaty is a core issue underlying this application and would refer to it in its entirety not only to deal with the opposing assertions of the parties but to bring to light certain inelegancies detected in the Table of Contents of that Article, its heading in the body of the Treaty and finally its actual contents. Article 16 is as follows:

> Subject to the provisions of this Treaty, the regulations, directives and decisions of the Council taken or given in pursuance of the provisions of this Treaty shall be binding on the Partner States, on all organs and institutions of the Community other than the Summit, the Court and the Assembly in their area of jurisdictions, and those to whom they may under the Treaty be addressed.

There is a variance between what the Table of Contents of the Treaty has for Article 16 as "Effect of Regulations, Directives, Decisions and Recommendations of the Council" together with the heading of the Article which also has the word "recommendations" included while the body of Article 16 does not include that word "recommendations". This is obviously an inelegant drafting which should be corrected either to eliminate the word "recommendations" from the Table of contents and from the heading of the Article or amend the Article to include that word in the body of the Article as well because it will one day lead to some uncertainty which should be avoided by a corrective amendment.

We see sense in the applicants' submission that since the Assembly is a representative organ in the Community set up to enhance a people centred co-operation, its independence under Article 16 of the Treaty should be preserved because the Treaty has not endowed the Council with any power to interfere in the operation of the Assembly. We agree and it is our view that Article 16 of the Treaty does not bear the meaning ascribed to it by the respondent in which it contended that decisions of Council bind the Assembly, Article 16 of the Treaty

notwithstanding. In light of Articles 14 and 16, we have come to the conclusion that decisions of the Council have no place in areas of jurisdiction of the Summit, Court and the Assembly.

Issue 4 is whether or not under Article 59 of the Treaty a member could move in the Assembly the Trade Negotiations Bill, the Immunities and Privileges Bill, and the Inter-University Council Bill. The Respondent pleaded in paragraph 9 of the Response as follows: -

> "At its 9th Meeting held on 24 November 2004, the Council decided that policy oriented Bills **such as those that have implications on the Partner States' sovereign interests and on the budgetary aspects of the Community** ought to be submitted to the Legislative Assembly by the Council under Article 14.3(b) of the Treaty as opposed to being proposed or introduced by any member of the Assembly under Article 59 of the Treaty. The Council, therefore, assumed responsibility for "The East African Community Trade Negotiations Bill, The East African Community Budget Bill, The East African Community Immunities and Privileges Bill and The Inter-University Council for East Africa Bill as Council Bills for consideration and submission to the Legislative Assembly."

In paragraph 10 of the response the Respondent pleaded that protocols can sufficiently provide for immunities and privileges for the Community and also for the Inter-University Council for East Africa. Issues 2 and 4 arose from the above pleadings by the Respondent.

Article 59 States:

> 1. Subject to the rules of procedure of the Assembly, any member may propose any motion or introduce any Bill in the Assembly:
>
>   Provided that a motion which does not relate to the functions of the Community shall not be proposed in the Assembly,

and a Bill which does not relate to a matter with respect to which Acts of the Community may be enacted shall not be introduced into the Assembly.

2. The Assembly shall not:

(a) Proceed on any Bill, including an amendment to any Bill that, in the opinion of the person presiding, makes provision for any of the following purposes:

(i) For the imposition of any charge upon any fund of the Community;

(ii) For the payment, issue or withdrawal from any fund of the Community of any moneys not charged thereon or the increase in the amount of any such payment, issue or withdrawal;

(iii) For the remission of any debt due to the Community; or

(b) Proceed upon any motion, including any amendment to a motion, the effect of which, in the opinion of the person presiding, would be to make provision for any of the said purposes.

There is no doubt that Article 59 provides for introduction of Private Member's Bills. It is also clear to us that both paragraphs (1) and (2) provide restrictions to the general power of legislation by the Assembly. The proviso to paragraph (1) prohibits the introduction of any motion in the Assembly which does not relate to the functions of the Community and does not relate to a matter with respect to which Acts of the Community may be enacted. Paragraph (2), on the other hand, prohibits the Assembly from proceeding with any Bill which imposes a charge on any fund of the Community. It is abundantly clear to us that the prohibition under the two paragraphs apply to any member of the Assembly, both the members and also the Council when introducing Bills in the Assembly.

Therefore the question is not whether or not in view of Article 59 (1) the three Bills or any one of them could be moved by a member but whether they could

be moved in the Assembly at all. To be able to determine that question would have required us to delve into the provisions of the Bills in great detail. Since we have elsewhere in this judgment found that the Bills are still pending before the Assembly and fortunately that is the view of all the parties to the reference, we deem it wise not to make such an investigation as to whether the Bills are within the ambit of Article 59 (1) or not. The proper course to take, we think, is to leave it for whoever is aggrieved with any of the Bills, in the context of Article 59, when they are taken on again in the Assembly, to raise the matter in the Assembly.

We will, however, make some general observations on the submissions of the parties regarding the provisions of Article 59. In their submission on issue 4 the Applicants submitted that under Article 59 which provides for Private Member's Bills, there is no restriction on introduction of Bills based on policy orientation and that apart from Bills that impose a charge on the fund of the Community or issue or withdrawal from any fund of the Community or the remission of any debt due to the Community, a member of the Assembly may introduce any Bill.

With great respect we do not share that view. We have already stated that the proviso to Article 59(1) prohibits the introduction of any motion in the Assembly which does not relate to the functions of the Community or does not relate to a matter with respect to which an Act of the Community can be enacted. We have also stated that the prohibition applies to both the Council and any member.

The respondent's contention in paragraph 9 of the Response was not confined simply to policy oriented Bills but it went on to describe them as "those that have implications on the Partner States sovereign interests." What it means is that the competence of the Community is restricted to matters which are within its jurisdiction. Any matter which is still under the exclusive sovereignty of the

Partner States is beyond the legislative competency of the Community. The Assembly is a creature of the Treaty like the other Organs of the Community and such an Organ can only have competence on matters conferred upon it by the Treaty. The Asembly has no power to legislate on matters on which the Partner States have not surrendered sovereignty.

Issue 7 is whether or not the decision taken by the Council at its 10th Meeting held on 4th to 8th August 2005 on the East African Community Trade Negotiations Bill is lawful and in accordance with the provisions of the Treaty. We have already held that the Bill was not withdrawn from the Assembly. All that the Council did was to seek a stay of the debate while a study on the development of trade legislation is being undertaken and concluded. We therefore find that the decision of the Council in this respect is within its powers under Article 14 of the Treaty and no fault may be ascribed thereto.

We would like, while commending all counsel who appeared and addressed us in this case, especially to commend the very useful and helpful submissions addressed to us by Counsel for the amicus curae who very ably and conscientiously assisted the Court without any attempt to side with any other party in the reference. The Court, as a friend of the *amicus curiae*, was guided accordingly.

On costs, Professor Ssempebwa urged the Court to what orders to make in the event his clients' Application succeeds. He indicated that the applicants are content with an order that their disbursements be paid by the respondent and would not insist on an order for full costs in their favour. That is because the applicants see their application being for the general public good and interest in the East African Region and any litigation of this kind should be encouraged especially by the Community which should show the way by indemnifying these applicants on their disbursement and any future litigants against costs occasioned by such litigation. The applicants, as we can see it, have succeeded

in almost all their prayers Though Mr. Kaahwa had urged that costs should follow the event, we find Professor Ssempebwa's submission acceptable to us. We therefore award costs of the application to the applicants and leave them to restrict their bill of costs and for the taxing officer to limit the taxation thereof to those disbursements.

Dated and delivered this---------- -------of October 2006

MOIJO. M . OLE KEIWUA
PRESIDENT

JOSEPH. N. MULENGA
VICE PRESIDENT

AUGUSTINO. S . L . RAMADHANI
JUDGE

KASANGA MULWA
JUDGE

JOSEPH. S . WARIOBA
JUDGE