IN THE EAST AFRICAN COURT OF JUSTICE
APPELLATE DIVISION
AT ARUSHA

(CORAM: H.R. Nsekela, P; E. R. Kayitesi and J. M. Ogoola, JJA)

IN THE MATTER OF AN APPEAL NO. 3 OF 2011
Filed on 19th October 2011, Under EAC Treaty Articles 5, 8, 23, 27, 30, 35A, 39, 111, 112 and 114

BETWEEN

THE HONOURABLE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA …… APPELLANT

AND

AFRICAN NETWORK FOR
ANIMAL WELFARE (ANAW) …… RESPONDENT

[Appeal from the Ruling of the First Instance Division of the East African Court of Justice at Arusha by J. Busingye, PJ; M. S. Arach Amoko,DPJ; JJ. Mkwawa, J. B. Butasi and I. Lenaola, JJ, given at Arusha on 29th August, 2011, in Reference No. 9 of 2010]

JUDGMENT OF THE COURT

Factual Background

The facts giving rise to this appeal, can be put quite simply. In sum, the Respondent: Africa Network for Animal Welfare ("ANAW" who was the Applicant in Reference No. 9 of 2010), filed that Reference in this Court challenging the "action" of the Government of the United Republic of Tanzania (the "Government") to, among others, upgrade, construct or commission the "NATTA-MUGUMU-TABORA B – KLEIN'S GATE – LOLIONDO ROAD" (also known as the "North Road" or the "Superhighway") across the Serengeti National Park. The "Reference" was filed by way of a "Notice of Motion", supported by an affidavit. In that Reference (or Notice of Motion), ANAW contended that the Government's action was unlawful and infringed the provisions of the EAC Treaty (the ("Treaty"). Accordingly, ANAW prayed the Court:

(1) to declare that the impugned action is "unlawful and infringes" the provisions of the Treaty; and
(2) to issue a permanent injunction restraining the United Republic of Tanzania from carrying out that action.

The Government, through its Attorney General the ("Attorney-General"), opposed the Reference. It raised the following six "preliminary" objections which, it argued, were dispositive of the entire dispute – namely, that :

(i) the Application is time-barred;
(ii) the Notice of Motion is bad in law for want of proper and specific enabling law;
(iii) the Application is ambiguous, scandalous, frivolous and vexatious for being neither a Reference, nor a Notice of Motion;
(iv) the affidavit supporting the Notice of Motion, is totally defective;
(v) the Court has no jurisdiction to determine and grant the reliefs sought; and
(vi) the Application is bad in law for merging two different applications in one.

The First Instance Division of this Court considered all the above "preliminary" objections; and, in paragraphs 35 and 36 of their Ruling of 29 August, 2011, came to the following conclusions – namely:

> *"35. In sum, we find and hold that:*
>
> *1. This Court has jurisdiction to handle this matter and to grant orders such as those sought by the Appellant.*
>
> *2. The Reference is not time-barred.*
>
> *3. The Reference, as drawn, is properly before the Court.*
>
> *4. The issue of affidavits does not arise at this stage.*
>
> *36. The Preliminary Objection is consequently overruled, in its entirety, with costs to the Applicant."*

Aggrieved by the above Ruling of the First Instance Division, the Attorney General lodged an appeal to this Appellate Division against "the whole of the said decision".

On 24th January, 2012, the Appellate Division of this Court, heard the Attorney-General's appeal. At the scheduling conference of the appeal, the following consolidated grounds of appeal were agreed:-

(i) Lack of jurisdiction;

(ii) Failure to consider and/or to properly weigh the Appellant's points of law and submissions;

(iii) Mixed grill, namely: Confusion over whether to file a "Notice of Motion" or a "Reference".

This Court will now consider each one of these grounds substantially in the order in which they have been presented above:

Jurisdiction

In the course of the oral submissions by learned counsel for both parties, in the appeal before us, it was made abundantly clear from the outset that the

Appellant's grievance in this particular ground of appeal was a limited one: namely lack of "jurisdiction" of this Court to grant the relief of a permanent injunction against a Partner State (the United Republic of Tanzania). In this regard, Counsel for the Appellant readily conceded that indeed this Court has jurisdiction to entertain a dispute that concerns environmental issues. To ascertain that concession, the question was put to Counsel at least three times; and three times Counsel explicitly and unambiguously admitted the Court's jurisdiction. Towards the end of his submission, however, Counsel seemed to recant his concession. However, realizing the grave consequences of any such recantation, learned Counsel quickly withdrew that line of argument, and confirmed that:

"I am, instead, withdrawing my present position; and reverting to my earlier concession: that this Court has jurisdiction to entertain a reference that involves environmental issues".

Be that as it may, the Court cannot and will not depend solely on a party's concession to derive jurisdiction for this Court. This is so because it is trite law, that it is not the Parties to a dispute who confer jurisdiction on a court of law. The Court must itself derive jurisdiction from its own underlying constitutive law – independently of what views the parties may or may not hold or espouse. To complicate matters somewhat, the First Instance Division of this Court, held in its Ruling of 29 August 2011 which is now challenged under the present appeal (the impugned Ruling) that:

"1. This Court has jurisdiction to handle this matter and to grant the orders such as those sought by the Applicant."

Notwithstanding, the clarity of the above holding by the Court, however, a close examination of the impugned Ruling does not disclose the reasons,

let alone the analysis, for the Court's holding. This was an unfortunate omission, about which the Appellant complained – and, in our view, quite rightly so. What reasoning there was in the Court's Ruling is captured in paragraphs 6 – 21 (both inclusive) of the Ruling. Of these, paragraphs 6 – 9 recite the opposing contentions of the respective Counsel for the Appellant and for the Respondent on the issue of "jurisdiction". Paragraphs 10, 11 and 12 delve into the sub-issue of whether the United Republic of Tanzania has or has no right to develop its infrastructure within its own borders (it does); and whether natural and legal persons may sue a Partner State under the Treaty (they can). Paragraphs 13 – 15 examine whether the impugned act was of a kind reserved for institutions of a Partner State under the ambit of Article 30 (3) of the Treaty (it was not). Paragraphs 16 – 19 deal with the sub-issue of whether the EACJ has "power" to grant the relief of a permanent injunction (it does). And paragraphs 20 and 21 sum up the Court's overall conclusion and collective holding on all these issues – namely that the Government action complained of in this Reference is not the kind reserved to the Partner States under Article 30 (3); and that Article 39 of the Treaty (on the granting of interim orders), does not bar the Court from granting the permanent injunction that was sought by the Applicant, ANAW.

It is evident from the above analysis that the Court below did not directly and effectually address the issue of substantive jurisdiction. Nowhere in the above cited paragraphs of its Ruling did the Court come out specifically and positively to state that the EACJ either has or has no jurisdiction to entertain a Reference grounded in an environment dispute. Instead, the Court confined itself to the ancillary issues of whether ANAW could as a

"natural or legal" person bring this Reference; and whether or not ANAW's prayer for a permanent injunction could be granted by the Court. Only obliquely did the Court get anywhere remotely close to the issue of substantive jurisdiction – namely, that the Government action complained of was not of the kind reserved to the Partner States (i.e outside the jurisdiction of the EACJ). This oblique reference amounted at best, to only an implicit finding of the Court's jurisdiction. But even so, it contains not any real emphatic "reasoning" for the Court's finding of jurisdiction in this environmental dispute – the first ever such dispute to come before this Court.

That omission was unfortunate.

This is so for, at least, two good reasons. First, Rule 68(5) of the EACJ Rules expressly requires the Judgment (including the Rulings) of this Court to contain "the reasons for the judgment". That Rule provides as follows:

> *"(5) The judgment of the Court shall contain:*
> *(a) the date on which it is read,*
> *(b) the names of the judges participating in it,*
> *(c) the names of the parties,*
> *(d) the names of the advocates and agents of the parties,*
> *(e) a concise statement of the facts,*
> ***(f) the points for determination,***
> ***(g) the decision arrived at,***
> ***(h) the reasons for such decision,***

(i) ***the operative part of the judgment,*** *including the decision as to costs*". [emphasis added]

In omitting to provide the reasons for their Ruling on jurisdiction, the First Instance Division failed to fulfill the requirements of Rule 68 (5). Second, the importance to supply the reasons for a court's judgment is self-evident. In matters of jurisdiction, a court is under double compulsion to adduce the reasons for its holding: first, to comply with Rule 68 (5) of our Court Rules; and secondly, to inform the Parties and the Appellate Division of the basis for the Court's decision.

Jurisdiction is a most, if not the most, fundamental issue that a court faces in any trial. It is the very foundation upon which the judicial edifice is constructed; the fountain from which springs the flow of the judicial process. Without jurisdiction, a court cannot take even the proverbial first Chinese step in its judicial journey to hear and dispose of the case – for, as NYARANGI, JA so aptly opined:

"W*ithout jurisdiction, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction" –* **(see Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR1 at 14)**.

On the other hand, the converse is equally damning – for:

"Where a court takes it upon itself to exercise a jurisdiction which it does not posses, its decision amounts to nothing." – see **Words and Phrases Legally Defined – Vol. 3: I – N, page 113**.

More subtle, however, but no less devastating is, where a court simply assumes that it has jurisdiction. Here, too, the authorities are clear:
"*It is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case*" – see the Tanzanian case **Fanuel Mantiri Ng'unda v Herman Ng'unda (CAT) Civil Appeal No. 8 of 1995 (unreported**).

In this regard, the Court drew comfort from the Parties' own pleadings. In their Reference, the Applicants (ANAW) had adverted to this subject of jurisdiction; and had gone to great lengths to argue the case for the Court's jurisdiction. In particular, the Applicants referred the Court below to a plethora of provisions of the law (both within and beyond the EAC Treaty) from which the Court should derive its environmental jurisdiction. Those provisions, which were all expressly pleaded in the trial before the First Instance Division, are Articles 5 (2) and (3); 8 (1) (c); 111 (1) (d); 111 (2); 112 (1) and (2); and 114 (1). In their essence, those Articles provide as follows:

Article 5 (2): The Partner States undertake to strengthen and regulate their infrastructural, social and other relations, to the end that there shall be harmonious and balanced development and sustained

expansion of economic activities the benefit of which shall be equitably shared.

Article 5 (3) (c): [the Community is under obligation to ensure] the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States.

Article 8 (1) (c) : [in their implementation of the Treaty provisions the Partner States are under a general undertaking] to *abstain* from any measures likely to jeopardize the achievement of the objectives or the implementation of the provisions of the Treaty.

Article 111 (1) (b): [the Partner States] *agree* to take concerted measures to foster co-operation in the joint and efficient management and sustainable utilization of natural resources within the Community.

Article 111 (1) (d): Partner States are *obliged* to provide prior and timely notification and relevant information to each other on natural and human activities that may or are likely to have significant trans-boundary impacts; and to consult with each other at an early stage.

Article 111 (2): prescribes as Community objectives the several requirements stipulated in paragraphs (a), (b) and (c) – namely:

(a) to contribute towards the sustainability of the environment;

(b) to ensure sustainable utilisation of natural resources like terrestrial ecosystems; and

(c) to jointly develop and adopt … management policies that ensure sustenance and preservation of ecosystems.

Article 112 (1): [For purposes of Article 111] the Partner States *undertake* to adopt, develop, encourage and promote all the co-operative measures listed in paragraphs (a) through (n) of Article 112 (2).

Article 114 (1): [For purposes of Article 111] the Partner States *agree* to take concerted measures to foster co-operation in the joint and efficient management and the sustainable utilisation of natural resources within the Community for the mutual benefit of the Partner States. In particular, the Partner States shall;

(a) take necessary measures to conserve their natural resources;

(a) co-operate in the management of their natural resources for the conservation of the ecosystems and the arrest of environmental degradation.

From this long catalogue of Treaty provisions, it is more than abundantly clear that the Partner States have bound themselves to observe a variety of express undertakings and obligations, concerning the promotion, preservation, conservation and protection of the environment. The scope and import of the environmental obligations voluntarily and freely undertaken by the Partner States under the Treaty, is broad and all-encompassing. The purpose of these Treaty provisions cannot and must not be allowed to be undermined by a narrow or restrictive reading of those provisions. Rather the provisions must be given a purposive interpretation, construction, application and implementation. Such is the essence of the Vienna Convention on the Interpretation of Treaties.

In the instant case, the Treaty obligations of the Partner States are to be examined and ascertained even more emphatically by reason of the nature, size and location of the proposed Superhighway Project – whose implications would loom large on the environmental landscape; and whose impact would immediately, directly, and substantially affect the interests of a neighboring Partner State (the Republic of Kenya: Masai Maara National Park) and, indeed, also the interests of the entire international community (through UNESCO's designation of the Serengeti National Park as a World Heritage). In this connection, it is not known whether or not the obligation in Article 111 (1) (d) of the Treaty (on trans-boundary consultations), was strictly observed between the United Republic of Tanzania and the Republic of Kenya concerning the proposed construction of the Serengeti Superhighway. For purposes of the Reference, however, the significant point is that this Article of the Treaty clearly and emphatically brings these kinds of actions of Partner States into the purview of the EACJ jurisdiction.

It is quite evident that all the above provisions impose on the Partner States of the EA Community one obligation or another; one duty or another; and one undertaking or another with regard to their mutual co-operation in the environmental field. The Applicant's position was simply this: Let the Court, which is the guardian of the Treaty, interpret these various Articles; apply them, and establish whether the Partner State in question here (namely, the United Republic of Tanzania) has or has not complied with its Treaty obligations under each and everyone of those Treaty provisions. It is beyond gainsaying that the Applicant's prayer here amounts to no more than asking this Court to exercise its undoubted jurisdiction under Article 27 (1) of the Treaty: t*o interpret and apply* the Treaty; and equally, the Court's indispensable mandate under Article 23 (1): *to ensure compliance with the provisions of the Treaty*. Needless to say, the Court's power under Article 27(1) to interpret the Treaty traverses the entire territory of the Treaty – it covers interpretation not only of the substantive Articles of the Treaty, but also of the objectives, principles, Annexes, Protocols, Rules, Regulations , Directives and Decisions attaching to or otherwise emanating from the Treaty.

Now, whether or not the United Republic of Tanzania has infringed those provisions – or any of them, is precisely what the present Reference seeks to establish. However, for purposes of ascertaining whether or not this Court has jurisdiction, it is not necessary to establish at this stage the alleged infringement, unlawfulness or illegality on the part of the United Republic of Tanzania. That was the cause of action before the First Instance Division. That is a matter for substantive trial – wherein the

Parties will adduce the requisite evidence and testimony, produce all witnesses (if and as needed), engage in examination and cross-examination, make submissions (whether written or oral or both), etc. On the other hand, at this preliminary stage, however, all that is required is for the Court to make the legal nexus between the Applicant's allegations and the existence of positive provisions in the Treaty, and elsewhere, that impose on the Partner States an obligation, a duty, or an undertaking that binds the Partner States to do or to withhold from doing or engaging in certain acts; or to observe certain standards or behavior in the area of environmental protection, conservation, and management.

Looked at from this stand-point, it is immensely evident that this Court has jurisdiction under Articles 5(2), 5(3), 8 (1) (c), 111 (1) (d), 111 (2), 112 (1), and 114 (1) (a) and (b) to entertain environmental disputes that are brought before it. This is so, notwithstanding the reservation in Article 30 (3) of the EAC Treaty; which provides for an exception to the Court's jurisdiction – namely:

> "*The Court shall have no jurisdiction under this Article where an Act regulation, directive, decision or action has been reserved under this Treaty to an institution of a Partner State".*

There is no provision at all under the Treaty which reserves environmental jurisdiction to the Partner States, or any of them or their institutions. In this regard, it is noteworthy that certain reservations to the Court's jurisdiction have been expressly stipulated in Articles 24 (1), 41 (2) and Annex IX of the EAC Customs Union Protocol, as well as in Article 50 (2) of the EA Common Market Protocol – through creation of parallel mechanisms for

dispute resolution which aim to exclude this Court's jurisdiction. As far as we are able to ascertain, none of these reservations encompasses the environmental arena of the Treaty, to exempt from this Court's jurisdiction the obligations of the Partner States in that area.

Accordingly, we have no hesitation at all to find and to hold that the many provisions of the EAC Treaty cited above do, singly and collectively, confer jurisdiction on the EACJ to entertain disputes involving the environmental obligations and undertakings of the EAC Partner States.

Indeed, these Treaty provisions do not only prescribe the Partner States' obligations, they themselves (read together with the provisions of Articles 28, 29 and 30 of the Treaty) do, in effect, constitute the cause of action – with the consequence that a claimant or an aggrieved party does not have to demonstrate a personal tort, right, infringement, injury or damage specific to himself in order to refer the matter to this Court for adjudication. The mere fact of the Treaty breach, is itself the cause of action – see this Court's holding in **Prof. Peter Anyang' Nyong'o & 10 Others v Attorney General of Kenya & 5 Others), Reference No.1 of 2006 Judgment of 30th March 2007)** on special causes of action created by the EAC Treaty**.**

In **James Katabazi & 21 Others v EAC Secretary General and the Attorney General of Uganda (Reference No. 1 of 2007: Judgment of 1st November, 2007),** this Court had occasion to apply elements of the doctrine of a special cause of action under the EAC Treaty. In that case, the cause of action in the matter before the Ugandan courts was contravention of the provisions of the Constitution of Uganda (regarding

prevention by the Army of decisions of the High Court and the Constitutional Court). Before the EACJ, however, the cause of action was totally different – namely, violation (by the Partner State) of the principles of the Rule of Law and of Good Governance enshrined in, inter alia Articles 5, 6, 7 and 8 of the EAC Treaty; and, therefore, an infringement of the Treaty.

In the premises, the first ground of appeal fails – to the extent (if any) that it sought to challenge the jurisdiction of this Court to entertain this Reference.

Permanent Injunction

As regards the ancillary features of "jurisdiction", the Appellant went to extraordinary, if not extreme, lengths to argue that the Court below had no *"jurisdiction*" (as counsel put it) to grant the reliefs prayed – and, in particular, the relief of a permanent injunction. While the Appellant's lead counsel characterized this as "jurisdiction", it would be more correct to call it the ***"power"*** to grant the challenged relief. This would be for a number of reasons. The granting or withholding of a relief - any relief prayed by a Party to a dispute – is not a function of the court's jurisdiction. Rather, it is a consequence of a court's holding or finding in a dispute in favour of that Party.

Jurisdiction being central and crucial to the authority of a court to entertain the dispute at all, is ordinarily pleaded upfront, at the commencement of the hearing or proceedings. The granting of a relief, on the other hand, always follows the substantive holding of the court, after the Parties have canvassed their respective sides of the case, on its merits. The relief, redress, remedy, restitution or sanction, as the case may be, is a

culmination of the court's holding or judgment: the consequence of the courts' assessment and evaluation of the merits of the case. There is no way the court can grant a relief unless and until it has first established or otherwise ascertained its jurisdiction in the matter.

Accordingly, the issue of appropriate reliefs is a function not of the court's "jurisdiction", but of the court's "powers". To mix up the two under the one rubric of jurisdiction, as was evident in this case, was to invite unnecessary and uncalled for difficulties. In the instant case, this mix up led to the Appellant's submissions on jurisdiction, when in truth the submission was limited to the power of the Court to grant or not to grant various reliefs. This in turn led the Court to treat the issue as a preliminary objection and to deal with it up front – when the issue was, in truth, best suited for dealing with at the end of the trial, in the context of the merits of the case; and, only if, the Applicants were found to have won their claim under the Reference. Worse still, as the matter was dealt with as a jurisdictional one, it led to a finding of jurisdiction for the Court, but without the necessary reasoning and analysis of how and why the Court had jurisdiction. The substantive jurisdictional issue was shrouded and completely covered up under the impermeable veil of groping in the thick mist of whether or not to grant an interim, let alone a permanent, injunction.

In light of all these, this Court is of the considered view that this ground of appeal before us is premature. All that the Court below held in its Ruling of 29th August, 2011, was that it had power to grant the reliefs – including grant of a permanent injunction – as prayed in the Applicant's Reference. Nowhere was it shown, or even contended that the First Instance Division

went beyond the step of holding that it has the power. Certainly the Court did not grant any interim injunction – let alone a permanent injunction or, indeed, any other relief for that matter. There was no way, in any event, that the Court would have granted any such relief at that stage, when all it was doing was considering preliminary points of law. As we have explained above, relief can be granted only after the trial, when the Parties have adduced evidence, witnesses (if any) have been examined, cross-examined, and judgment has been entered for the Party praying the particular relief.

It is evident then that all that was before us was at best, the Party's own anticipation and, at worst, the Party's own speculation if not imagination, that the Court might grant the feared permanent injunction.

To that extent, this ground of appeal was intrinsically speculative; and, therefore, premature before this Court. For this Court to canvass that ground, as now prayed, would be to deal in the purely academic, the abstract, the conjectural and the theoretical. It is quite clear that the issue concerning the appropriate relief as contested before the First Instance Division, was equally premature. Indeed, it should not have been treated as a preliminary objection at all. It was incapable of disposing of the Reference – since it should have been dealt with at the end, and not at the commencement, of the trial. And, in any event, calling for the weighing, appreciation and ascertainment of facts and evidence (as it did), this objection was not a proper preliminary point of *pure* law. An objection whose disposal requires proving or disproving of facts or evidence, ceases to be a preliminary point of law. Accordingly this Court, declines to go into the substantive merits of this particular ground of appeal.

Before taking leave of this particular aspect of this ground of appeal, we are constrained to make an important and critical observation concerning the trial Court's treatment of what the Parties framed as *preliminary points of law*. It is quite clear in this Reference that the First Instance Division had before it up to six issues to determine – namely (i) time-bar, (ii) want of enabling provisions, (iii) ambiguous, scandalous, frivolous and vexatious suit (iv) defective affidavit (v) "jurisdiction" to grant a permanent injunction, and (vi) the "mixed grill" issue. A careful look at all these issues and the manner and extent to which the Court's ruling dealt with each one of them, reveals that only one or two (out of the six) was truly a Preliminary Point – in the sense of being a pure point of law, whose determination could dispose of the entire Reference. Chief among such Preliminary Points was the jurisdictional issue, albeit limited to the "power" of the Court to grant the relief of a permanent injunction against a Partner State.

All the other so-called Preliminary Points were not at all Preliminary Points of law. Each and everyone of them involved the clash of facts, the production of evidence, and the assessment of testimony. Any such issue (depicting those features) cannot and should not be treated as a Preliminary Point. Rather, it becomes a matter of substantive adjudication of the litigation on its merits – with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined; and a finding of fact then made by the Court. On the proper treatment of preliminary objections in this Court, we have articulated our views at length in our judgment of today's date in the parallel case of **Attorney General of Kenya v Independent Medical Legal Unit EACJ, Appeal No. 1 of 2011 (**from Reference No. 3 of 2010**).**

“Mixed grill” Issue

The Appellant made a spirited argument concerning the formal propriety of the correct filing of the matter before the First Instance Division. Was it a “Reference”, brought under Rule 24 of this Court’s Rules of Procedure; or a “Notice of Motion” filed under Rule 21 of those Court Rules? The importance of that question lies in the legal consequences attaching to either Rule. A Reference under Rule 24 requires no supporting affidavit; but needs to show and to present the various detailed substantive contents specified in that Rule. A Notice of Motion, on the other hand, requires a supporting affidavit, but does not need to specify any substantive information concerning the particulars of the complaint. Secondly, and even more importantly (for the purposes of this present case), a Reference requires the Respondent to make a reasoned Response in defence; while a Notice of Motion could be answered by a counter-affidavit (as indeed the Appellant, in this case, was led to do).

In response to the Appellant’s above submissions, the Respondent underscored four points: **First**, the documentation filed in this case, contained all the relevant underlying provisions of the law for a defence. Indeed, it expressly carried the word “Reference” in its title. **Second,** that indeed the body of the documentation did contain all the contents required for a Reference under Rule 24 (2) – namely: the particulars (name, identity, address, residence) of the Applicant and of the Respondent, the subject matter of the Reference, a summary of the law; the nature of the supporting evidence, and the orders sought.

Third, that the word "Notice of Motion" crept onto the face of the documentation accidentally and unintentionally; as, indeed, was the addition of a supporting affidavit (which in this case was mere surplassage). While all this made for some confusion, the Respondent contended that the Respondent (now Appellant) was not caused any substantive prejudice or injustice.

Fourth, the Respondent urged this Court to consider that the mix up in the nomenclature in this case arose from the mix-up inherent in the two sets of Rules themselves. Rule 24 (1) states that a Reference under that Rule is instituted by presenting to the Court "an application". The word "*application*" is not defined or referred to anywhere in the Rules, except in Rule 21, in which it is stipulated that:

> *"all applications to the First Instance Division shall be by notice of motion; which shall state the grounds of the application".*

This Court agrees with the Respondent. The Court Rules in question are, indeed, an unfortunate source for confusion and pitfalls. On their face, the Rules require all matters filed before the Court (presumably including references, such as the instant Reference) to be instituted through "application" by way of "notice of motion". Therein lies the germ of confusion – especially for the unwary or the uninitiated litigant and/or their lawyer. The devil is in the drafting. To that extent, the Court is not prepared to visit the sins of the inelegant drafting of its own Rules on the hapless heads of the lawyers, let alone of the Parties themselves. We are alive to the fact that the Court's practice is still embryonic at this early stage of the Court's operations. There is still room for that practice to take root

and to bloom among the practising lawyers; and for the Court itself to revisit its own Rules with a view to streamlining the potential pitfalls of practice.

Moreover, the documentation that was presented to the First Instance Division contained all the hallmarks of a Reference instituted under both Rule 24 of this Court's Rules of Procedure, and Articles 23, 27, 30 and 39 of the EAC Treaty; as well as under *"all other enabling provisions of the law"*. It carried the word **"Reference"** in its title; and, even more significantly, it contained all the substantive contents of a Reference as required under Rule 24 (2) of the EACJ Court Rules. In matters of this kind, one of the critical dispositive points to consider is whether the "irregularity" (if that is what the mix-up was), caused the Party (the then Respondent) to suffer any significant prejudice, hardship or injustice. There was none. All that the Respondent (now the Appellant) contended, was that he was misled by this documentation in making a response by way of a counter- affidavit, instead of a fully fledged Response.

That may well be – but we are of the view that the "irregularity" in contention here was not a fatal one. It was one that could have been cured upon application and ample explanation to the Court below. Indeed, it is not too late for the Appellant to do just that. We are fortified in this view by the Respondents learned Counsel's own affirmation on this issue – namely, that the Respondent is ready, even now, to accommodate any such request for appropriate amendment of pleadings by the Appellant. This Court is, therefore, prepared to remit the matter to the First Instance Division for substantive trial of the merits of the Reference – and the

opportunity to rectify, as appropriate, any irregularities lurking in the pleadings of the Parties.

One last word on this aspect of the appeal. The Appellant contended that this mix-up in the Applicant's pleadings constituted a "procedural irregularity" fit for an appeal under Article 35A of the Treaty (and Rule 77 of the Court Rules). While the mix-up could have been "irregular", it is debatable whether it did and could amount to a "procedural" irregularity. This is because, procedural irregularities are in character, irregularities that attach to the conduct of a proceeding or trial. It comprises such irregularities as the inadmissibility of documents or witnesses, denying a party the opportunity to be present or to be heard at all, hearing a matter in camera (where it should be heard in public and *vice versa*), failure to notify or serve in time or at all, etc. In this regard, "procedure" is defined in **Black's Law Dictionary (9th Edn. at p. 1324)** as:

> "*the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."*

Clearly, the emphasis in the above definition is on "*regularity*" and "*orderlines*" of the judicial progression of the process – "irregularity" being a departure or variation from the normal conduct of action (**Black's Law Dictionary** *supra***, at p. 906).**

In short, procedural irregularities attach to a denial or failure of due process (i.e. fairness) of a proceeding or hearing. It seeks to ensure orderly, fair, equitable, balanced, transparent, honest and just progress in the conduct of the steps encompassed in carrying out juridical proceedings

– from commencement of the action, to delivery (and execution) of judgment. The mix up in this case, on the other hand, arises from the interpretation and application or implementation of the provisions of the Court's Rules. We were prepared to entertain this aspect of the appeal in the event that it raised substantive points of law under Article 35A (a) of the EAC Treaty, or in as far as it amounted to a procedural irregularity under the ambit of paragraph (c) of that same Article. As it turned out, however, we find that the matter raised no point of law; nor did it manifest any "procedural irregularity", properly so called.

Accordingly, that ground of appeal too must fail.

Weighting of the Law and Counsel's Submissions

The Appellant's last ground of appeal was to the effect that:

> *"2. That, the Court of the First Instance erred in law in according no legal weight to the submissions and precedents submitted by the Respondent/Appellant" .*

In his oral submission before this Appellate Division, learned Counsel for the Appellant explained that notwithstanding his submission in the First Instance Division concerning the interpretation and application of Article 23 (1) – read with Article 39 – of the EAC Treaty, the First Instance Division did not apportion weight to his submissions. This may well have been the case. The Ruling of that Division dated 29 August 2011, does not specifically apportion any weightings to the various averments, contentions and submissions of the respective Counsel – and neither does the Court record of the proceedings of that Division dated 29 July 2011. That being

the case, however, it is clear that while the Appellant may be genuinely aggrieved, the issue now before this Appellate Division cannot be a proper appeal. As a general rule, the Court has no mathematical formula for apportioning its weighting in these kinds of judicial considerations. More specifically, however, there are two other considerations of substantive import.

First, Article 23 (3) confers on the First Instance Division original jurisdiction to entertain matters brought before this Court. That Article states that:-

> *" 23 (3). The First Instance Division shall have jurisdiction to hear and determine, at first instance, subject to a right of appeal to the Appellate Division under Article 35A, any matter before the Court in accordance with this Treaty".*

Second, it is important to recall the architecture of the Treaty – particularly so after the August 2007 Amendment of the Treaty. Both Article 23 (3) and Article 35A are creatures of that Amendment. Article 35A provides as follows:

> "*35A. An appeal from the judgment or any order of the First Instance Division of the Court shall lie to the Appellate Division on –*
> *(a) points of law;*
> *(b) grounds of lack of jurisdiction; or*
> *(c) procedural irregularity."*

The intention of the Amendment (which the above two provisions of the Treaty set out to implement) was to transform the EACJ from a one-

chamber court (whose judgments and decisions were final), into a two-chamber court, with one chamber exercising original jurisdiction, and the other exercising appellate jurisdiction. Article 23(3) confers on the First Instance Division all the original jurisdiction of the Court. Article 35A, on the other hand, delienates, in a limited and restricted fashion, the scope, nature and extent of the appeals that may be brought to the Appellate Division. The great divide here is essentially one of **law** *versus* **facts.**

Only questions of law, jurisdiction or procedural irregularity may be appealed to the Appellate Division. Questions of fact are exclusively and conclusively decided at the level of the First Instance Division. They are not appealable to the Appellate Division. Evaluation and assessment of questions of fact before the First Instance Division are to be determined by the First Instance Division exhaustively and with finality – without appeal to the Appellate Division. In their wisdom, the framers of the EAC Treaty saw it fit to allocate these respective roles to the two Divisions of the Court. In matters of fact, the two Divisions do not have concurrent jurisdiction. In view of this clear demarcation of juridical space, therefore, we find that in this instant Reference, the Appellate Division has no role to entertain the Appellant's last ground of appeal whose import is one of fact – namely, whether the Court below accorded weight to the Appellant's submissions. For the Appellate Division to do so, would be to purport to stand in the shoes of the First Instance Division to hear the matter at its level of original jurisdiction and, indeed, to arrogate unto itself a role which is, by the clear provisions of the Treaty, expressly allotted to the trial Division of this Court.

In the result, we dismiss all the grounds of the appeal. However, as all these grounds were appeals against preliminary objections raised in the Court below, we order that the matter be, and is hereby, remitted to the First Instance Division for substantive trial and adjudication of the Reference on its merits.

It is so ordered.

DATED at ARUSHA this 15th day of March, 2012.

……

Harold R. Nsekela

PRESIDENT

……

Emily R. Kayitesi

JUSTICE OF APPEAL

……..

James Ogoola

JUSTICE OF APPEAL