IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA - FIRST INSTANCE DIVISION

(Coram: Johnston Busingye, PJ; Mary Stella Arach-Amoko, DPJ; John Mkwawa, J; Jean Bosco Butasi, J; Isaac Lenaola, J).

REFERENCE NO. 10 OF 2011

BETWEEN

LEGAL BRAINS TRUST (LBT) LIMITED ..... APPLICANT

AND

ATTORNEY GENERAL OF UGANDA ..... RESPONDENT

Date: 30th of March, 2012

JUDGMENT OF THE COURT

1. INTRODUCTION:

This is a Reference by Legal Brains Trust Ltd, (the Applicant) under Articles 23, 27 and 30 of the Treaty for the Establishment of the East African Community (the Treaty) and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (2010). The Reference

seeks the interpretation of Article 51 (1) of the Treaty which provides that:

"1. 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." (underlining is added for emphasis).

2. BACKGROUND:

The Speaker of the Parliament of Uganda wrote to the Respondent a letter dated 25th August 2011, requesting him to seek an advisory opinion from the East African Court of Justice (the EACJ) on the interpretation of Article 51 (1) of the Treaty, because she had received two divergent views on the interpretation of the Article specifically as regards the phrase ***"for a further term of five years".*** One school of thought suggests that the phrase means that a member is free to seek re-election every time a term of the East African Legislative Assembly (the EALA) comes to an end. The second interpretation is that EALA members shall serve for two terms only.

The Speaker stated in her letter that Article 51(1) was incorporated in the Uganda Rules of Procedure of Parliament and she did not want to be faced with the same issue of conflicting interpretation during the forthcoming EALA elections due this year.

Upon receipt and perusal of the said letter, the Attorney General, the Respondent herein, was of the view that this was not a question of law but it was a matter that he could handle using his constitutional mandate as the principal legal advisor of the government. Consequently, he did not seek the advisory opinion of the EACJ as requested, but instead

went ahead to interpret the Article and advised the Speaker vide his letter dated 24th November 2011 that:

"Following the literal rule of interpretation, the phrase "a further term of five years" which uses the article "a" implies that the words following the article "a" being "further term of five years" are meant to refer to one more term of five years.

Accordingly, the phrase "a further term of five years" means that the elected members are eligible to hold office for another term or a second term which will run for five years thereby making their total tenure as two terms only". (underlining added for emphasis)

The Applicant, a limited liability company, whose main objective is stated to be, *inter alia,* to defend the rule of law, democracy and good governance in the region, stated that, when it came across the interpretation of Article 51(1) by Respondent, it formed the view that the interpretation was erroneous, unlawful and if the issue is not resolved by this Court, it is likely to once again lead to litigation which will adversely affect the smooth functioning of the EALA. It therefore filed this Reference and prayed for orders:

(a) That the decision of the Respondent to the effect that a Member of the East African Legislative Assembly can only hold office for two terms is unlawful.

(b) That the said decision infringes the provisions of the Treaty.

The Applicant also prayed that the costs of the reference be provided for.

The Respondent filed a response in which he denied the allegations set out in the reference and contended that his action was lawful and constitutional in his capacity as the Principal Legal Advisor to the Government of Uganda.

In the premises, the Respondent averred that the reference has no merit and prayed for its dismissal with costs.

1. Issues:

At the scheduling conference held on the 24th February 2012, three issues were agreed upon for determination by the Court , namely:

(1) Whether under Article 51(1) of the Treaty, a Member of the EALA can only hold office for a maximum of two terms.

(2) Whether it was an infringement of the Treaty for the Attorney General of Uganda to interpret Article 50 (1) of the Treaty.

(3) Whether the Applicant is entitled to the remedies sought.

It was further agreed by both parties that the evidence was to be by way of affidavits. The said affidavits were namely, that of Mr. Isaac Kimaza Ssemekede, the Executive Director of the Applicant filed in support of the Reference and that of Hon. Peter Nyombi, the Attorney General of Uganda, filed in support of the response.

Counsel requested the Court dispense with oral arguments due to the urgency of the matter and we allowed them.

(4) <u>RESOLUTION OF THE ISSUES</u>:

Issue No. 1: ***Whether under Article 51(1) of the Treaty, a member of EALA can only hold office for a maximum of two terms:***

4.1 Submissions by Counsel for the Applicant:

Learned Counsel for the Applicant Mr. Wandera Ogalo submitted that:

The reference seeks the interpretation of Article 51(1) of the Treaty which reads:

"Subject to this Article, an elected member for the assembly shall hold office for five years and be eligible for re-election for a further term of five years.

The law applicable to the interpretation of the Treaty was laid down by this Court in **Ref. No. 1 of 2006 – Peter Anyang Nyongo and Others –v – Attorney General of Kenya and others,** citing Article 31 of the Vienna Convention on the law of Treaties. It is that:

"1. ***A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose.***

2. The context for the purpose of interpretation of a treaty shall comprise, in addition to the text ..."

In applying the above principles to the issue before us, Mr. Ogalo divided his submissions into sub-headings A and B.

A – The Ordinary meaning of the words:

Under this sub-heading, Mr. Ogalo submitted that the specific words requiring interpretation in his view, are **"a further term".** The Respondent at page 2 of his letter which is Annexture "C" to the Reference, gives his understanding of the meaning of those words where he stated that ***"accordingly the phrase "a further term of five years" means that the elected members are eligible to hold office for another term or a second term which will run for five years thereby making their total tenure as two terms only".*** (Mr. Ogalo added the underlining for emphasis).

The Annexture was signed personally by the Hon. Peter Nyombi, the Attorney General and in Mr. Ogalo's view, the Respondent was in fact giving an alternative meaning to the phrase. The first is that it means ***"another term"*** and secondly that it can mean ***"a second term."***

According to Mr. Ogalo, the ordinary and natural meaning of the words **"a further term"** cannot by any stretch of imagination equal ***"a second term***". To say so is a curious argument that would appal any English speaking person. A **"second"** is specific and limiting. It means number two. While **"**a **further**" has no aspect of limitation attached to it.

Firstly, he entirely agreed with the first meaning given by the Respondent that a **"a further term of five years simply means another term of five years",** but contended that the last part where the Respondent says **"thereby making their tenure two terms only"** is incorrect. His argument is that, by adding these words, the Respondent

imported into the phrase being interpreted, something entirely new. This was therefore, the Respondent's conclusion, not the interpretation of the phrase for interpretation.

Secondly, Mr. Ogalo contended that in the context of the whole sentence, the question to ask is: what is ***"and be eligible for re-election***?***".*** In his view, to claim that the words limit the number of terms is to read ***and "eligible for re-election"*** in isolation from the words ***" for a further term of five years."*** When the two are put together, it is clear that eligibility for re-election is for a further terms (sic) of five years. It is eligibility for re-election which creates a right for another term. Therefore, a further term of five years can only make sense when there is eligibility for re-election. Without eligibility for re-election, there can be no ***" further term of five years".*** In Mr. Ogalo's view, reading the words in the context of the whole sentence leads to one conclusion: the words in issue are tied to ***" eligibility"*** and not to term limits.

In an effort to prove his point that the ordinary and natural meaning of the phrase **"a further term**" creates no limitation to two terms as the Respondent appears to think, Mr. Ogalo reproduced the following examples which he had downloaded from the internet:

1. **Jomo Kenyatta (from Wikipedia p.6):**

   "*On 29th January 1970, he was sworn as President for* ***a further term****. For the remainder of the presidency ... Kenyatta was again re-elected as President in 1974, in elections which he, again, ran alone. On 5th November 1974, he was sworn in as President for a third term****".***

He submitted that if the Respondent's interpretation is right, it means that when Jomo Kenyatta was sworn in on the 29th January 1970, that was the last term and he would not be eligible to stand again for President. Yet we see him standing for another term. We see the words sworn in for **"**a ***third term".*** Clearly, the words ***"a further term"*** meant and mean **"*another term".*** The writer used them well aware that he would a few minutes later write that Jomo Kenyatta stood for a third term.

2. An English news article published on the 23rd November, 2011 read:

> ***"****Engineer Philip Okundi's term as CCK chair extended by* ***"a further 3 years"*.**

According to a press release from the CCK circulated today, President Mwai Kibaki has made the appointment through a Kenya Gazette notice in accordance with Section 6 (1) (a) of the State Corporation Act, Cap. 446.

The ***re-appointment*** *is effective October 25, 2011 and follows Engineer Okundi's first appointment as CCK Board Chairman."*

Mr. Ogalo argued that in order to determine the meaning of the phrase ***" a further three years"*** , we need to look at the origin. President Kibaki made the appointment under section 6(1) (a) of the State Corporations Act, Cap. 446. That section imposes no limitation of terms of service. It does not contain the words ***"a further".*** It simply empowers the President to appoint the chairman of the Board and indeed the writer of the article quotes the section. When using the term ***" a further term of three years"*** he or she was aware that there was no limitation. By using

the words, therefore, he or she clearly meant ***" another term"*** and not ***"one last term".***

2. **Mahammed El Baradei: (Wikipedia p.12)** :

   " Comments on no fourth term;

   In 2008, El Baradei said that he would not be seeking a fourth term as Director General. Moreover, he said, in an IAEA document, that he was not available for **"*a further term"*** in office**."**

Mr. Ogalo submitted that the writer of the article used the phrase ***"a further term"*** to mean another term. This is because Mr. Bardei had made a conscious decision not to run for a third term. It was not the law barring him. He could not have used the phrase to mean a second or last term because Mr. Baradei had already served three terms. If the Respondent's interpretation is right, he could only have used the phrase after his first term.

3. Jail term :

"... Former Argentine dictator Bignone was Thursday handed ***a further 15 year*** *jail term..."*

... The latest sentence against Bignone who had already been sentenced twice, to 25 years in jail and to life imprisonment **..."**

Mr. Ogalo argued that the said newspapers refer to the 15 years as ***the latest sentence*** and not the ***last sentence.*** That it would indeed be illogical to reason that even if other crimes were uncovered, no conviction or sentence would be imposed because ***a further 15 years jail term*** means the ***second and last sentence.*** Moreover the article shows that the man had already been convicted twice i.e.

already two terms in jail. The words are obviously used to mean ***another jail term.***

4. **The Guardian Newspaper:** The heading of the Newspaper is:

" You Tube Saudi woman driver faces ***further 10-day jail term.***

A Saudi Arabian woman who posted a video online of herself driving her car is facing ***another 10 days*** *in prison, according ..... from the Kingdom".*

According to Mr. Ogalo, this leading British Newspaper was using the word ***" further"*** and ***" another"*** interchangeably. They mean the same thing.

5. Constitutional Court of Slovenia:

The writer says:

" Nine judges are elected for a period of nine years with no possibilities of ***a further term ..."***

Mr. Ogalo submitted that it would be illogical to say the term means ***one other term*** when clearly, **"*no possibility"*** exists.

6. HSBC :

"HSBC has agreed ***a further three year term*** as global sponsor of FEI **...."**

According to Mr. Ogalo, ***" a further three year term"*** was equated to ***"renewal".***

7. High Commissioner Guterres:

" High Commissioner Guterres seeks mandate ***renewal for further five year term.***

The UN General Assembly voted on Thursday to ***renew*** the mandate of High Commissioner Antonio Guterres extending his term by ***a further five years."***

Mr. Ogalo contended that in this article, a ***" further five years term"*** heading of the article is described in the main body of the article as a ***"renewal" .*** That this is exactly what a member of the EALA does. He or she goes for re-election to renew his or her mandate.

8. Bashir:

The author writes:

"Bashir sworn in for ***a further term***. Sudan's President Omar Hassan Bashir is sworn into office for ***another five years*** after disputed elections**."**

Mr. Ogalo contended that in this article, the author used ***"a further term"*** and ***"another five years"*** interchangeably.

Mr. Ogalo submitted further that, even in statutes, the words are used to mean ***"another"*** as shown below:

1. **The Commercial Banking Company of Sydney Incorporation Act:**

   The legislature of New South Wales extended the powers of the bank for a **"further term of ten years"**; and whereas the ten years were about to expire, Parliament was now extending to the bank, power to issue, circulate and re-issue bank notes for ***"a further term of twenty one years"***.

   He submitted that if the argument of the Respondent is to be allowed, it would mean that when the New South Wales Parliament used **"a further term of ten years"** that would be the second and last term.

Yet we see that after that second term **" a further term of twenty one years is used."**

He submitted that in all three occasions, Parliament used the words to mean **"another term"**. To hold otherwise, would therefore be illogical as it would mean that the country would cease to have a legal tender because the words mean **"*only"*** and **"*last term"***. That is absurdity in itself.

2. **The Privacy Act of Canada:**

Section 53 (3) of the 1985 Privacy Act of Canada reads:

"*The Privacy Commissioner, on expiration of a first or any subsequent term of office, is eligible to be re-appointed for* ***a further term not exceeding seven years".***

According to Mr. Ogalo, the proper construction to put on that section is that there is a first term after which the section allows subsequent terms. In other words, subsequent terms can be one or many. Even after that one (which would be a second) the holder can still be re-appointed for a further term. There is therefore the first term, followed by another term or subsequent terms and still the holder is eligible for a further term. **"*Further term"*** is therefore used to mean **"another term"**. If **"a further term"** meant one and that term, the wording of this statute would be at variance with logic. No one would draft in that way.

B - Words in their context and in light of the treaty's objective and purpose:

The main thrust of Mr. Ogalo's submission under this sub-heading is that the overriding objective and purpose of Article 51 (1) is to prescribe the period of time when a member holds office. It is simply to tell us that a member shall be in office for five years. That is the primary objective. The matter of eligibility to be re-elected is secondary. Therefore the primary objective to prescribe the period of the term cannot be mixed with disqualification. If it were true that a member is limited to two terms, then it becomes a disqualification to run for a third term. Such a person would not be disqualified to be elected. That aspect of non qualification cannot fall under an article with a heading **"*Tenure of office of elected members"***. In other words, disqualification cannot be the object and purpose of an article providing tenure.

He added that the object and purpose of such article is to provide for the act of holding office; the terms and conditions while in that office as provided in Article 51 (2) ; and vacation of office as provided in Article 51 (3).

He further submitted that the purpose and object of Article 51(1) can be seen in light of Article 51 (2) and (3) as providing tenure of office rather than disqualification to hold office. The Article whose purpose is to provide for qualifications and by implication disqualification, is Article 50(2). One would qualify to be elected provided he or she has not served two terms.

He contended that matters relating to electing members of EALA are provided for in Article 50(1). These include the Electoral College, number of Members to be elected, representation and how they shall be elected. After being elected under Article 50 (1), a member then holds office under Article 51, and the holding of that office can be questioned under

Article 52. Each of the three Articles (50, 51 and 52) have a different object and purpose.

Mr Ogalo asserted that, the Respondent, by interpreting the Article in issue as he did, seeks to mix up the different objects and purposes of the Articles of the Treaty. He seeks to mix up election with tenure. Election or re-election as well as qualifications is the subject matter of Article 50. That interpretation is thus erroneous.

He averred that the object and purpose of Article 50(1) is not to limit the number of terms but rather to provide for what happens when the five years come to an end that is the ability to seek a fresh mandate.

To prove his point and to eliminate the Respondent's interpretation of the said Article, Mr Ogalo then analysed and compared the words in Article 51(1) to the following Articles of the Treaty:

(a) Article 67 (4) which provides that ***"The Secretary General shall serve a fixed five year term".***

(b) Article 68 (4) which provides that *"**The Deputy Secretaries General shall each serve a three year term renewable once".***

(c) Article 53 (1) and (2) which provides that ***"1. The Speaker of the Assembly shall be elected ..... to serve for a period of five years."***

(a) The Speaker of the Assembly **" *shall vacate his or her office upon expiry of the period for which he or she was elected."***

(b) Article 25 (1) provides that ***"1..... a Judge appointed under paragraph 1 of Article 24 of this Treaty, shall hold office for a maximum period of seven years".***

He contended that the Treaty provisions in respect of all the above offices are explicit where they intend to limit the number of years for holding office in the Community. There is no vagueness. The language is clear and unambiguous. There is no room left as to whether or not a holder of an office can remain in office after a particular time. Words such as " ***"a fixed five year term, renewable once"*** and ***"a maximum period of seven years"***, show clearly that where the framers of the Treaty intended to limit the period of service, they said so very clearly.

In keeping with that, he further argued, there would have been no reason for them not to frame Article 51 (1) in the following terms, if the Respondent's interpretation is correct:
"*... shall hold office for five years and* ***be eligible for re-election for only one other term of five years";*** or

> ***"****... shall hold office for five years and* **be eligible for re-election only once";** or
>
> ***"****... shall not hold office* ***for more than two terms of five years each".***

It was Mr. Ogalo's strong contention that, the fact that the framers of the Treaty did not use explicit wording in Article 51(1) as they did elsewhere in the Treaty can only mean that the Respondent's interpretation is erroneous.

Mr. Ogalo submitted further that the Respondent's argument that the letter **"a"** used before the word **"further"** creates a single term is incorrect. The New Webster Dictionary defines the letter **"a"** as **"*used primarily before nouns in the singular, before collectives which imply a number of persons or things***."

The Oxford Advanced Learner's Dictionary defines the letter ***'a'*** inter alia as ***"used instead of one before numbers: "a thousand people were there"***. Further, the Dictionary defines the word ***'a'*** as ***"any, every".*** The Dictionary then gives an example of ***"a lion is a very dangerous animal".*** This would therefore equate '***a'*** to ***"any or every".*** The said Dictionary also defines a noun as "***a word that refers to a person, a place or thing, a quality or an activity."***

The word **"further"** is not a noun. Accordingly, it cannot turn letter ***"a"*** into a singular. Indeed in **R vs. Durham Justices (1895) 1 QB 801**, it was held that **"a"** can mean **"any".** In **Re Fickus (1900) ICL 331**, ***"a share"*** was defined to mean ***"some share",***

In that context therefore, **"a further term"** can mean **"any term"** or **"every term".** This is best explained by a member who serves from 2001 to 2006, is not re-elected for the 2007 – 2012 term but is again elected for the 2012 – 2017 term. The two terms he or she has served can be equated to **"*any term"***. The 2012 – 2017 term cannot be called **"a further term"** for such a member because of the five year gaps between them. This shows the absurdity of the Respondent's argument.

Mr. Ogalo submitted that further absurdity can be shown by the fact that such member is not eligible to be elected for the 2017 – 2022 term

because the 2001 – 2006 and 2011 – 2017 terms are two terms. The 2001 – 2006, 2011 – 2016 and 2022 - 2027 are three non-consecutive terms. The use of **"a"** in this context is therefore not **"one"**, but **"any**". A member could as well be elected for those three non-consecutive terms. It would be illogical to argue that a member who has served two consecutive terms (2001 – 2011), is not eligible for election for the 2016 – 2022 term.

He argued that the letter ***"a"*** before the word "**further**" is equivalent to **"any"** not **"one"**. That the case of **Queen V Brocklehurst (1892) QB 566** throws more light on the word **"further"**. In that case, the question was, what the meaning of **"further proceedings"** is**.** A .L. Smith J stated that the definition placed upon that expression by the guardians that **"*further proceedings*"** means ***"a fresh start"*** was right. Therefore, **"*a further term"*** means ***"a fresh start "***. A member is eligible to be elected anew. It is a fresh start.

He concluded his argument on this point by stating that, in his interpretation of Article 51(1) of the Treaty, the Respondent applied the law on interpretation of statutes. Had he applied the law on interpretation of treaties instead of the law of statutes, there is a possibility that he would have reached a different conclusion. He appears to regard the Treaty as an Act of Parliament, which is a grave misdirection.

4.2 Submission by the Respondent's Counsel:

In response to Mr. Ogalo's submissions, Learned State Attorneys M/s Margaret Nabakooza and Mr. Kasibayo Kosia (learned counsel for the Respondent) supported the interpretation by the Respondent in its

totality and submitted that a member of the EALA is eligible for re-election only once, hence he or she can only hold office as a member of the EALA for only two terms,

They, however, agreed with Mr. Ogalo on the law on interpretation of treaties as stated in the **Anyang Nyong'o Reference** (supra) as the Vienna Convention on the Law of Treaties.

Apart from that, Counsel for the Respondent were of the view that the rules that govern interpretation of treaties and statutes are not very different from each other. They pointed out that the literal rule of interpretation also applies in that words are given their natural and ordinary meaning.

They referred us to **Sir Rupert Cross On Statutory Interpretation , 3rd Edn. 1995, p. 1** where the author states that :

"... the essential rule is that words generally be given the meaning which the normal speaker of the English language would understand them to bear in the context in which they are used."

Counsel for the Respondent also relied on **Maxwell on Interpretation of Statutes, 12th Edition by J. Langon, Chapter 2: General Principles of Interpretation;** where it is stated that the first and most elementary rule of construction is that it is to be assumed that the words and phrases of a technical legislation are used in their technical meaning if they have acquired one and otherwise in their ordinary meaning; and secondly, that phrases and sentences are to be construed according to the rules of grammar. That, if there is nothing to modify, alter or qualify the language which the statue contains, it must be construed in the ordinary and natural meaning of the words and sentences. It is further

stated in the said text book that the safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases.

In further support of this point, Counsel relied on the statement in **Pinner v Everrett (1969) ALL ER 258-9,** by Lord Reid that: In determining the meaning of any word or phrase in a statue, the first question to ask is always " what is the natural or ordinary meaning of that word or phrase in its context in the statute"? It is only when that meaning leads to some result which cannot be reasonably supposed to have been the intention of the legislature that it is proper for some other possible meaning of the word or phrase.

According to counsel for the Respondent, if the above rules are applied in the construction of the phrase ***" a further term of five years,"*** which uses the article ***"a"***, it implies that the words following the article ***" a"*** being ***" a further term of five years"*** are meant to refer to only one further term of five years. Accordingly, the phrase ***"a further term of five years"*** means that the elected members are eligible to hold office for another term or a second term which will run for five years therefore making their total tenure as ***two terms only.*** (emphasis was added by Counsel for the Respondent for emphasis).

Regarding the second leg of the submission by Mr. Ogalo, Counsel for the Respondent's response was that the context in which the words are used is indeed paramount in the interpretation of such words. That the key object of Article 51(1) is to provide for the period or tenure of office of an elected member of the EALA; and secondly, it provides for whether such member can be eligible for re-election to that office; and how many

times. That for one to be eligible for another term of five years, that person must have held office or been in office as a member of the EALA for five years. Therefore, where one has been in office for two terms, hence ten years, he or she falls outside the ambit of the Article 51(1) and is not eligible for re-election upon the expiry of ten years.

Counsel further submitted that holding office for five years and eligibility for re-election for a further term of five years have to be read together and cannot be separated because: the first part of the sentence is joined to the second part of the sentence by the word ***"and"***, which is classified as conjunctive in character and connotes togetherness, according to **GC THORNTON LEGISLATIVE DRAFTING, 3RD EDITION, P. 84.** Therefore, where one has been in office for 10 years, the first part of Article 51(1) is no longer applicable; and where that one is not applicable, then the next part automatically lapses , for the reason that the two are connected by the word ***"and"*** and hence one sentence that can only be read as one to get the meaning.

Counsel for the Respondent further argued that the Treaty is supposed to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose. Good faith would dictate that ***"a further term"*** means another one term and to subject it to any other kind of interpretation than its ordinary meaning would be a total deviation from the intention of the framers of the Treaty.

Regarding the Commercial Banking Company of Sydney Incorporation Act , New South Wales, Counsel for the Respondent contended that one is not eligible for re-election after ten years in office, under Article 51(1) of the Treaty, unless it is amended. Similarly, New South Wales

amended the Act after realising the ten year limitation. Had it not done so, the bank's authority to issue, circulate and re-issue bank notes would have expired.

4.3 Reply by Applicant's Counsel:

Counsel for the Applicant made a brief reply in which he agreed that the words whose meaning is sought is ***"a further term"*** but strongly reiterated his earlier position.

4.4 Resolution of Issue No. 1 by the Court:

This is the crux of the Reference. The issue revolves around the interpretation of Article 51(1) of the Treaty. The Vienna Convention on the Law of treaties sets out the international rules of interpretation of treaties. Apart from the **Anyang' Nyongo** reference(supra), this Court has applied the rules in other references such as, **the East African Law Society and four others vs The Attorney General of the Republic of Kenya and three others, Reference No. 3 of 2007.**

Article 31 that comprises the general rule of interpretation reads:

"***1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose***.

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

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

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

3. There shall be taken into account:

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

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties.

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

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

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

This is what this Court stated in the latter reference:

> ***"Taking into account the said general principles of interpretation enunciated in Article 31 of the Vienna Convention, we think we have to interpret the terms of the Treaty not only in accordance with their ordinary meaning but also in their context and in light of their objective and purpose. Primarily we have to take the objective of the Treaty as a whole, but without losing sight of the objective and particular provision*"**.**

In interpreting Article 50(1) of the Treaty, we have adopted the same approach.

In the first part of his submissions, Mr Ogalo contented that the specific words requiring interpretation are **" a further term".**

We do not agree with him. What requires interpretation is contextual, that is, the whole of Article 51(1) of the Treaty. It is in our view, a deliberate way of isolating that phrase from the context of Article 51(1) and is perhaps calculated to confuse the Court. It is therefore against the principle of interpretation of treaties that a treaty shall be interpreted in good faith.

We also disagree with his argument that when the phrase **" and be eligible for re-election"** is put together with ***" for a further term of five years",*** it means eligibility for a further term of five years.

That interpretation in our view, suggests that there was a previous term or terms. It simply means that someone has already been serving and he can be re-elected . The further term has a definite length or period, that is, five years. We are unable to see the further terms after the five years.

In the context of Article 51(1), we think that it becomes even clearer. The Article provides that an elected member shall hold office for five years and be eligible for re-election for a further term of five years. This means that upon election to office, a member serves five years and he or she is then eligible for re-election for a further term of five years. It means that he or she can even serve only one term of five years if he or she is not re-elected. The total period is ten years.

Regarding Mr Ogalo's submission on non-consecutive terms, our view is that Article 51(1) of the Treaty does not address itself on no-consecutive terms. The question of election of EALA members generally, is not before us in this Reference. The issue before us is specific, it concerns the tenure of EALA members under Article 51(1) of the Treaty and it starts from to the first term of five years followed by eligibility for re-election to a further term of five years. Article 51(1) is clear, it says, the tenure is not renewable perpetually.

We have also perused the articles and newspaper reports referred to us by Mr Ogalo. We do not need to comment on them in detail. Suffice it to say that Counsel should have warned himself of the dangers of relying on newspaper articles as authorities because they are not. Further it is common knowledge that news reporters are prone to using phrases and words without necessarily considering their legal definitions. Most importantly, we find that they do not support the Applicant's case because they were used in the context of the respective circumstances of those reports.

The Jomo Kenyatta one is the best illustration on the point simply because at that time, it well known that at the material time, Kenya had no term limits, so the phrase could in the circumstances rightly mean an endless re-election. Moreover, according to the article, Mzee Jomo Kenyatta ran alone in the said elections until he was unable to do so due to age and poor health.

Regarding Mr Okundi's tenure, there is a definite understanding of how long Engineer Okundi could serve as Chairperson of the Kenya Communications Commission. He had a three year tenure to which he could be appointed without any limitation.

Regarding Mr. Baradei, we see that it was his choice not to run for a further term but there was no doubt what that fourth term meant.

For the Argentinean dictator, it was certain from his own submissions that the dictator was given 25 years in jail, then a life sentence, and the further 15 year jail term was for crimes against humanity, i.e. another jail term altogether. We did not have the benefit of listening to Mr Ogalo orally, so his submission on this point left us in confusion. We do not know where this submission supports his case, is it on the length of the jail term or the meaning of the word ***"further" ?.***

In the case of the Saudi Arabian woman who was convicted of driving, our view is that the further ten days were in addition to the five days she had already spent in jail. So, it was clear.

The rest of Mr. Ogalo's examples are not any different from the above. We do not need to comment on them any further in the judgment.

To drive home his argument that Art 51 (1) does not limit the number of terms members of EALA can serve the Assembly, Mr Ogalo compared the construction of Art 51 (1) with that of the other articles providing for tenure of office in other organs of the community. He submitted that Articles 67 (4), 68(4), and 25(1) of the Treaty (above cited) which provide respectively for the tenure of service of the Secretary General, Deputy Secretaries General and Judges of this Court, are explicit in their intention to limit the number of years of holding office in the Community, that there is no vagueness, that they are in clear unambiguous language and that they leave no room for whether or not a holder of office can remain in office after a particular time. He

substantiated his argument by pointing out phrases such as ***"a fixed five years term, renewable once"*** and ***" a maximum period of seven years"*** that the framers of the Treaty employed to convey a clear intention to limit periods of service in the Community.

We shall not reproduce the Articles here, since we have done so earlier on in this judgment. We have however carefully examined the said Articles including Article 51(1) and have come to a different conclusion, that is, that all the Articles are as explicit as can be on the number of years for holding an office in the Community.

Article 25 (1) provides, with a **"shall"** that a judge of the Court shall hold office for a maximum of seven years; Article 51 (1) provides, with a **"shall"** that an elected member serves a term of five years and, after re-election, a further term of five years; Article 67 (4) provides, with a **"shall"** that the Secretary General serves a fixed five years term and 68 (4) provides, also with a **"shall"** that a Deputy Secretary General serves a three years term renewable once.

We also see nothing to fault the language in Art 51 (1) for. This is because we do not see anything even remotely vague or ambiguous in the Article. Apart from the wilfully blind, no one else would fail to read and understand the tenure of office of elected members as provided in the article. Nothing calls for interpretation, since in our view, a plain reading of the Article is enough.

We find, instead, that the framers of the Treaty in Art 51 (1) went the proverbial extra mile to prevent the kind of misinterpretation the applicants are deliberately indulged in by inserting the words ***"five years"*** both for the first term and ***"five years"*** to clarify the situation

after re-election. We do believe that the framers risked repetition and wrote ***"five years"*** twice in one short sentence for avoidance of doubt as to what their intention was. Even if they had stopped at ***"a further term"*** a common sense contextual interpretation would have shown that that further term was consistent and equal to the previous one.

We do not find any particular linguistic hurdles that the Applicant needed to cross in order to understand what is clearly an ordinary and straightforward English sentence.

Mr Ogalo argued that the object and purpose of Article 51(1) cannot be the object and purpose of an Article providing for tenure and disqualification at the same time. With due respect, we find that he is the only one reading disqualification in Article 51(1).It is not the Respondent's interpretation. Similarly, for us, what we see in Article 51(1) is tenure of elected members. That is the heading of the Article and it goes on to say that the members will be in office for five years upon election and for a further term of five years upon re-election. Our ordinary and plain understanding of tenure is a period of time when someone has a job or is holding office.(See: **Longman's Dictionary of Contemporary English page 1710**.)

Mr. Ogalo also says that the Article whose purpose is to provide for qualifications and by implication, disqualification, is Article 50(2). We agree with him in the sense that Article 50(2) sets down, from (a) up to (e), the qualifications of an electable person. We also agree that someone who falls short of any of those qualifications is not electable and is therefore disqualified. But with due respect and for the reasons already stated in this judgment, we part company with him at the point

where he attempts to stretch the provisions of Article 50(2) to cover tenure as well.

With due respect to learned counsel for the Applicant, we are also not persuaded by his argument that a **"*a further term*"** means **"*any*"** or **"*every term*".**

The phrase under interpretation *is* ***"a further term of five years".*** It would be absurd to say that the phrase means **"*any term of five years*"** or ***" every term of five years",*** as the applicant's counsel would like us to believe.

By reason of the foregoing, we are unable to accept Mr. Ogalo's novel argument.

We accordingly answer this issue in the affirmative.

ISSUE NO. 2: ***Whether it was an infringement for the Honourable Attorney General to interpret Article 50(1) of the Treaty.***

4.5 Submissions by Counsel for the Applicant:

Learned counsel for the applicant submitted that the this issue should be answered in the affirmative for the following reasons:

When the Speaker wrote to the Honourable Attorney General (referred to herein as the Respondent, for brevity), as head of one arm of government to another, she had formed the view that the matter required an advisory opinion, so she specifically stated that the Respondent should seek an advisory opinion on the interpretation of Article 51(1) from the Respondent from this Court. She demanded so

because the Respondent has the mandate **" *to represent the government in courts..."*** under Article 119 (4) of the Constitution of Uganda.

Counsel stated that the Speaker did not seek legal advice from the Respondent or his opinion . Her letter was written in very simple English. He submitted that where an institution of government of a partner state wishes to have an advisory opinion from the EACJ on a matter touching the interpretation of the Treaty, it is not open to anyone or authority to decide whether the opinion of the Court should be sought or not. The Attorney General is a mere conduit to facilitate the concerned institution or body.

This is because, firstly, Article 36 generally gives a partner state authority to seek an advisory opinion. Article 1 defines Partner State. The honourable Attorney General is not a Partner State. The query has to emanate from a person, institution or body implementing the provisions of the Treaty and not the Attorney General. The Attorney General is not the one applying the Treaty and may not comprehend the magnitude of the difficulties the Speaker is grappling with. In the present case, the Speaker had to determine whether to exclude a candidate from the ballot paper. If the Speaker makes a wrong decision, it may lead to litigation and annulment of the whole election which would lead to suspension of EALA like in 2006. With respect, the Honourable Attorney General did not seem to comprehend the effect of blocking the Speaker. This Court ought, for that reason, to lay down a general rule as to how advisory opinions from partner states ought to be processed.

Mr Ogalo submitted that the second reason is consistency. The question posed by the Speaker arises from Article 50(1) of the Treaty which provides for tenure of office of EALA members. As directed by Article 8 (2) of the Treaty, Uganda as a partner state, enacted The EAC Act, 2002, to give effect to the Treaty. Section 3 thereof confers on the Treaty the force of law in Uganda. It is very clear therefore, that the Treaty is part of the laws of Uganda. It is a schedule to the EAC Act 2002. That makes it part of the law of Uganda. The question of tenure of members of Parliament of Uganda is a matter of law.

That the Schedule which is the Treaty itself provides who has the jurisdiction to interpret the Treaty and vests that power in the EACJ . In other words, an Act of Parliament confers upon the EACJ jurisdiction to interpret the Treaty. That is the law in Uganda. There is no law whatsoever which grants the Attorney General the authority to interpret the Treaty.

He contended that the Attorney General seems to be acting under the mistaken belief that the authority under Article 119 (4) of the Constitution to give legal advice to the government of Uganda includes usurping the jurisdiction of this Court. These are two different things.

Jurisdiction is conferred by law. It cannot be assumed. The assumption by the Honourable Attorney General to interpreted the Treaty therefore infringed Articles 27(2) and 23 (1) of the Treaty because he purported to do what is vested elsewhere in the Treaty.

4.6 Submission by the Respondent's Counsel:

The response of the Respondent's Counsel was, no, the Attorney General did not infringe the Treaty by giving an opinion on the matter. Their contention is that the Attorney General, being the principal legal advisor to government, after addressing his mind to the principles of interpretation and bearing in mind the busy schedule of this Court, thought it wise not to seek an advisory opinion on a matter that was and is still self explanatory as discussed in issue number one. By so doing, he did not usurp the power of the Court, but was fulfilling his constitutional mandate under Article 119 of the Constitution.

They submitted that Article 33(2) of the Treaty envisages interpretation of the Treaty provisions by national courts although this Court remains with the supremacy in interpretation of the Treaty.

They further submitted that Article 31 of the Treaty does not mean that it is a mandatory requirement for the courts or tribunals of a Partner State to seek interpretation form this Court. They can do so if they consider that a ruling on a certain question is necessary. That the same applies to advisory opinions. The seeking of an advisory opinion by a Partner State is purely discretionary. A State can only seek an advisory opinion from this Court if it deems it necessary. That in any case, an advisory opinion is not binding on all Partner States, it can be challenged through a reference, just like in the instant case, where one is not satisfied with the interpretation.

Counsel for the Respondent contended further that to argue otherwise would lead to a floodgate of applications seeking for advisory opinions from this Court, hence paralyse the normal operations of the Court. It

would therefore be a risky precedent to hold that member states are under a mandatory duty to seek an advisory opinion when a member a party state requests the Attorney General of that party state to do so.

A party state should be left to exercise its discretion as to which matters are referred to this Court for advisory opinion.

The contention by the applicant that the Attorney General is just a conduit is therefore untenable and should be rejected by the Court.

4.7 Resolution of Issue No. 2 by the Court:

It is not in dispute that Article 36 of the Treaty gives a Partner State authority to seek an advisory opinion and that the Attorney General has the mandate to make the request. We however disagree with Mr Ogalo that the Attorney General is a mere conduit. The language of Article 36 is discretionary. It says:

The Summit, Council or Partner States <u>may</u> request the Court to give an advisory opinion <u>regarding a question of law arising from this Treaty which affects the Community,...</u>" (underlining is added for emphasis).

The Article gives the Attorney General the discretion to make the request for advisory opinion to this Court where he deems appropriate in his capacity as the principal legal advisor to government. The Attorney General, must of course, exercise that discretion judiciously, on the basis of the materials or information available to him or her, otherwise his or her decision can be challenged in a court of law.

In the instant case, we observe that the materials availed to the Honourable Attorney General of Uganda, namely, the Speaker's letter, the Treaty, specifically Article 36 thereof, clearly shows that the issue before him:

a) is a question of law which required resolution by the Court;
b) It arose from the Treaty; and
c) Affects the Community.

Therefore, a judicious exercise of discretion by the Respondent should have compelled him to request for an advisory opinion from this Court and saved the Community the costs of this Reference.

Otherwise, we find that the Articles of the Treaty cited by Counsel for the Respondent are not useful as they do not apply to the Respondent. Article 31 deals with disputes between the Community and its employees, while Article 33 deals with the interpretation of the Treaty by national Courts. Article 33(2) actually states expressly that the interpretation by this Court takes precedence over that of national courts.

We do not, however, find anywhere in his opinion that the Attorney General was holding out as the Court. His document is, in our view, a legal opinion and cannot be mistaken by any stretch of imagination as an advisory opinion from this court. The criticism that he usurped the power of this court is thus unfair, in the circumstances.

For the reasons given, we find and hold that the Attorney General, in resorting to interpret the Treaty instead of making a request for an

advisory opinion, did not infringe the Treaty as such, but failed to exercise his discretion judiciously.

We, however, strongly advise that before any Attorney General or official of any Partner State of the Community makes such a decision or does such an act, he or she should always warn himself or herself of the ramification of the real possibility of five different interpretations of an Article of the Treaty (from the five Partner States). We therefore find it imperative to remind the Partner States particularly Attorneys General that the need for consistency in interpretation of Treaty provisions, should make it imperative for them to refer questions of interpretation of the Treaty to the East African Court of Justice (EACJ), the organ established, inter alia, for that purpose.

In the result and for the reasons given, we answer issue No. 2 in negative.

ISSUE NO. 3: ***Whether the Applicant is entitled to the reliefs sought.***

4.8 Submission by Counsel for the Applicant:

Learned Counsel for the Applicant submitted that the applicant is entitled to the reliefs sought on the basis of his submissions in the preceding issues. The Court should order accordingly.

4.9 Submission by Counsel for the Respondent:

Learned Counsel for the Applicant is not entitled to the reliefs sought. That it could have requested the Court for an advisory opinion without

involving the respondent. The reference was uncalled for, therefore, it should be dismissed with costs to the respondent.

4.10 Resolution of issue No. 3 by Court:

We respectfully disagree with the Respondent's Counsel's submission that the Applicant could have requested for an advisory opinion from the Court instead of filing this Reference. This is because the Treaty does not allow individuals or other legal entities like the Applicant to request for advisory opinion from this Court. It is restricted to the Summit, the Council and Partner States under Article 36. Instead it is the Respondent's duty to do so.

As a result of our findings on the previous two issues, we find and hold that the Applicant has not made out a case for the grant of the orders sought in the Reference. We answer this issue in the negative.

The Reference is accordingly dismissed.

We however order each party to bear its costs, this being in our view a public interest litigation. This is because it was not contested by the Respondent that the objectives of the Applicant are, inter alia, the defence of the Rule of law, democracy, good governance and human rights in the region. The Reference was thus for the benefit of the Community.

We thank both parties for the zeal and industry they exhibited in this Reference.

Dated and delivered at Arusha this 30th day of March, 2012.

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JOHNSTON BUSINGYE

PRINCIPAL JUDGE

.....

MARY STELLA ARACH AMOKO

DEPUTY PRINCIPAL JUDGE

.....

JOHN MKWAWA

JUDGE

.....

JEAN BOSCO BUTASI

JUDGE

……

ISAAC LENAOLA

JUDGE