



IN THE EAST AFRICAN COURT OF JUSTICE IN ARUSHA
FIRST INSTANCE DIVISION

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

REFERENCE NO. 6 OF 2011

- 1 **DEMOCRATIC PARTY and**
2 **MUKASA MBIDDE.....APPLICANTS**

AND

- 1 **THE SECRETARY GENERAL OF THE EAST
AFRICAN COMMUNITY1ST RESPONDENT**
- 2 **THE ATTORNEY GENERAL OF THE
REPUBLIC OF UGANDA.....2ND RESPONDENT**

Date: 10 May 2012

JUDGMENT OF THE COURT

1 INTRODUCTION

This is a Reference by the Democratic Party, one of the Registered Political Parties in the Republic of Uganda and represented in the Parliament of Uganda, (hereinafter referred to as “the DP”) and one Mukasa Fred Mbidde, a DP Member and legal Advisor of the DP and an Advocate of the Courts of Judicature of Uganda.

The Reference is brought under Articles 6 (d), 7, 8, 23, 27, 30, 33, 39 and 50 of the Treaty for the Establishment of the East African Community (the Treaty) and Rules 1 (2), 17 and 24 of the East African Court of Justice Rules of Procedure (the Rules).

The Reference is supported by the Affidavit of Mukasa Fred Mbidde.

The 1st and 2nd Respondents are the Secretary General of East African Community and the Attorney General of the Republic of Uganda, respectively.

In opposition to the Reference, there are the replying affidavits, for the 1st Respondent, of Dr. Julius Tangus Rotich, a Deputy Secretary General and for the second Respondent that of The Attorney General, Hon. Peter Nyombi, MP and that of Daniel Gantungo, of the Attorney General's Chambers, Uganda.

Mr. Justin Semuyaba appeared for the Applicants, Mr. Wilbert Kaahwa appeared for the 1st Respondent and the 2nd Respondents was represented by Mr. Philip Mwaka and Ms. Christine Kaahwa.

2 BACKGROUND

This Reference is predicated on conformity to Article 50 (1) of the Treaty which provides that, “1. *The National Assembly of each Partner State shall elect, not from among its members, nine members of the Assembly, who shall represent as much as is feasible, the various political parties in the National Assembly, shades of opinion, gender and other special interest groups in that Partner State, in accordance with such procedure as the National Assembly of each Partner State may determine.*”

Pursuant to the above Article, the Parliament of Uganda passed the Rules of Procedure of Uganda's Parliament, 2006, providing for election of members of the East African Legislative Assembly (hereinafter referred to as "EALA"). The Rules were, in 2008, found to be in contravention of Article 50 of the Treaty and various Articles of the Constitution of Uganda by Uganda's Constitutional Court in a now famous **Constitutional Petition No 28 of 2006, Jacob Oulanyah Vs The Attorney General** (hereinafter referred to "**the Oulanyah Case**") and were declared null and void. The Attorney General of Uganda applied for, and obtained a stay of execution of that judgment, appealed against it to the Supreme Court of Uganda and that appeal is still pending todate.

3. The Applicants' case.

The crux of the Applicants' case is that the Government of the Republic of Uganda and its Parliament are unwilling to amend the Rules of Procedure of Parliament, 2006 for the election of the EALA Members to have them conform to the provisions of Article 50 of the Treaty and that the Government and Parliament of Uganda intend to conduct the upcoming EALA elections by those unamended Rules.

The Applicants contend that those Rules, specifically Rule 11 (1) and Appendix B r3, 10 and 11 of the rules in issue, contravene not only Article 21 (1) and (2), 29 (1) (e) 89 (1) and 94 (1) of the Uganda Constitution but also Article 50 of the Treaty to the extent that they discriminate and limit the freedom and right of the DP and its members, including the second Applicant, to associate in vying for election as representatives of the EALA.

The Applicants also claim that the Secretary General has failed to supervise the Government of Uganda to ensure that its Parliament amends the rules in question to make them consistent with Article 50 of the Treaty.

The Applicants maintain that the above state of affairs means that the DP, other Political Parties and shades of opinion in Uganda, though represented in the Uganda Parliament are, and will not be, represented in EALA, which violates Article 50 of the Treaty.

Fearing that this state of affairs will continue and become irreversible unless the Court intervenes, the Applicants filed this Reference and prayed for orders that;

- a) Rule 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used by the Parliament of Uganda in the election of the members of the East African Legislative Assembly in the upcoming elections are inconsistent with and contravene Articles 29(1) (e) of the Constitution of the Republic of Uganda, to the extent that they limit the freedom and right of the Democratic Party and its members including the second applicant to associate in vying for election for members as representatives in the East African Legislative Assembly (EALA).
- b) Rule 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used in upcoming elections of the members of the East African Legislative Assembly are inconsistent with and contravene Articles 21(1) and (2) of the Constitution of the Republic of Uganda, to the extent that they discriminate against the opposition political parties including the second applicant in vying for elections to the East African Legislative Assembly.
- c) The procedure to be carried out under the authority of Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used by the Parliament of Uganda in election of members of the East African Legislative Assembly are inconsistent with and contravene Article 89(1) and 94(1) of the Constitution of the Republic of Uganda to the extent that the said Rules of Parliament do not allow the Members of the Parliament of Uganda to elect the members of EALA.
- d) The procedure to be used under the authority of Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 which are going to be used by the Parliament of Uganda in the upcoming elections of the members of the East African Legislative Assembly under Rule 2 (2) the interpretation section thereof do not define election in its true sense of the word as they provide for approval and not election.

- e) The inaction of the Parliament of Uganda to amend the said Rules to conform to Article 50 of the Treaty for Establishment of the East African Community is in itself an infringement of the fundamental principles and the doctrines and the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights which are enshrined in those articles of the Treaty of the Community in particular with regard to peaceful settlement of disputes.
- f) The inaction and the loud silence by the Government of Uganda and the Parliament of Uganda in not amending and realigning Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda 2006 in accordance with Article 50 of the Treaty for Establishment of the East African Community which are going to be used by the Parliament of Uganda in the upcoming elections of members of the East African Legislative Assembly is an infringement of Article 50 of the Treaty for Establishment of the East African Community.
- g) The Secretary General of the East African Community has failed to supervise the Government of Uganda to ensure that the Parliament of Uganda amends its laws in order to make them conform to Article 50 of the Treaty for the Establishment of the East African Community.
- h) PENDING the hearing and determination of the instant motion, this Honourable Court be pleased to restrain and prohibit the East African Legislative Assembly, The Attorney General of Uganda and The Parliament of Uganda from conducting and carrying out any elections, assembling, convening, recognising, Administering Oath of office or otherwise howsoever presiding over or participating in the Election of the Representatives of Uganda and recognizing of any names of nominees as duly nominated and elected to the East African Legislative Assembly until Rules 11(1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda, 2006 which are going to be used by the Parliament of Uganda in the upcoming elections of the members of The East African Legislative Assembly

are amended by the Parliament of Uganda to conform to Article 50 of Treaty for Establishment of the East African Community.

- i) The Attorney General is vicariously liable for the actions of The Government of Uganda and The Parliament of Uganda.
- j) The costs of this Reference be provided for.

4. The 1st Respondent's case

The 1st Respondent counters by denying the legality of the Applicants' claims and in particular argues that election of members of EALA is a function of Partner States' National Assemblies; that the Republic of Uganda pursuant to Article 50 (1) of the Treaty and the Rules of Procedure of Parliament of 2006, has determined the procedure for the election of EALA Members; that any amendment howsoever caused is a process vested in the Parliament of Uganda over which the Secretary General has no supervisory powers. The 1st Respondent asserts further that not only do matters complained of in this Reference not fall within the purview of Article 29 of the Treaty, but that he has also not considered that the Republic of Uganda to has failed to fulfil a Treaty obligation. The Secretary General finally asserts that further, and in the alternative, the Parliament of the Republic of Uganda has "within its Constitutional sovereignty and discretionary powers" embarked on addressing the Rules of Procedure that were impugned.

5. The 2nd Respondent's case.

For its part the 2nd Respondent states that the Republic of Uganda and its agents, at all times and in all instances, acted within their constitutional mandate and within the confines of the Treaty, the African Charter and related instruments. In particular, the 2nd Respondent states that it acknowledges that the rules in question were impugned and, accordingly, an amendment process commenced; that proposals have been made and will ***"be imminently presented to the Plenary for consideration"***; that the information is in the public domain and finally that the Applicants' failure to acknowledge the above casts doubt on their good faith in bringing this Reference to this Court.

We need to point out at this juncture, for chronological reference, that when this Reference was filed the Applicants applied, under certificate of urgency, for a restraining order and the Court allowed the application and granted a temporary injunction restraining the Attorney General of Uganda and the Parliament of the Republic of Uganda from conducting elections of the Representatives of the Republic of Uganda to the EALA until determination of this Reference.

6. Scheduling Conference

Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on the 29th February, 2012 at which the following were framed as the points of agreement and disagreement respectively:

(i) points of agreement:

- a) The election of members of the East African Legislative Assembly is governed by Article 50 of the Treaty;
- b) Pursuant to the provisions of the Treaty, the election of the Members of the EALA from the Republic of Uganda is the preserve of the Parliament of the Republic of Uganda;
- c) The current Rules of Procedure (Appendix B to the Reference) were declared null and void in the **Jacob Oulanyah** case;
- d) Amendments have been proposed/tabled before Parliament by the Attorney General of the Republic of Uganda and the process of amendment is ongoing.

(ii) points of disagreement:

- a) Whether or not the 1st Respondent has failed to supervise the Government of the Republic of Uganda to ensure that its National Assembly amends its Rules of Procedure for election of members of the East African Legislative Assembly.
- b) Whether or not the Applicants are entitled to declarations sought against the Respondents.

It was further agreed at the said Conference that evidence would be by way of affidavits.

The Parties also agreed to file written submissions in respect of which they would make oral highlights at the hearing.

Both parties noted that the case presented a good potential for settlement and it was agreed that the case preparation and attempts to settle should proceed concurrently and, in the event that a settlement is reached, the Court would be informed and appropriate orders would be issued. Ultimately no settlement was reached, hence this judgment.

7. Preliminary Point

In their written submissions and at the hearing, Counsel for the 2nd Respondent raised an issue *in-limine*, which they called “a preliminary objection on a point of law” to the effect that the Reference is moot and an abuse of Court process, in view of the proceedings in the Parliament of the Republic of Uganda to amend the 2006 Parliamentary Rules of Procedure. Consequently, counsel invited the Court to find that it has no jurisdiction to proceed with it. In addition Counsel asked the Court to take into consideration the fact that time was fast running out for the next EALA elections and prayed, in the alternative, that the Injunction Order be varied to enable the elections to take place.

In support of this stance, Counsel for the 2nd Respondent submitted that;

- a) the Parliament of Uganda has not taken any steps to conduct elections of its EALA Representatives under the 2006, Rules of Procedure;
- b) although there is in place a stay of execution of judgment in the **Oulanyah**, Case there is ample evidence that the Parliament of Uganda is in the process of amending its Rules of Procedure, which are due to be enacted imminently and are in any case the Rules of Procedure to be used in the 2012 EALA elections;

- c) the matter could have been resolved administratively without recourse to Court and the Applicants being in Parliament knew that it could be so resolved;
- d) this Reference is premised on assumption or speculation, with no iota of evidence offered, that the 2006 Rules of Procedure will be used in the EALA elections of 2012;
- e) the instant Reference is anticipatory in nature, could have been addressed administratively without recourse to court and is, therefore, not properly before or justiciable in this Court.

Mr. Semuyaba, Counsel for the Applicants, also in submissions and at the hearing, opposed the 2nd Respondent's objection and put up the following reasons:

- (a) that EALA members who had been elected to represent Uganda using the 2006 rules went ahead to sit in the Assembly for five years during which period the appeal of the Oulanyah Case before the Supreme Court was never heard;
- (b) that for all intents and purposes, the impugned Rules 11 (1) and Appendix B r 3, 10, 11 of the Rules of Procedure of the Parliament of Uganda, 2006 have not been amended to date, are still law and are still on the statute books in Uganda;
- (c) that it is clear that the Attorney General of Uganda is not ready and willing to amend the Rules impugned by Uganda's Constitutional Court because he (the Attorney General) filed a Memorandum of Appeal in which he stated that he was dissatisfied with the whole of the judgment and decision of the Constitutional Court;
- (d) that the Minister of State for Justice and Constitutional Affairs of Uganda, Hon. Fredrick Ruhindi stated in Parliament that the Government did not abandon the Appeal in the Supreme Court;
- (e) that the Court should take judicial notice of the fact that the Petitioner in **Constitutional Petition No 28 of 2006**, Hon Jacob Oulanyah has changed political alliance and joined the NRM Party and is, therefore, unlikely to pursue the petition as he is no longer an independent member of the Parliament of Uganda;

- (f) that the foregoing demonstrates that the Reference is not moot, anticipatory or premature as alleged by the 2nd Respondent but a Reference that raises issues that can stall the operations of the Community if not resolved.

It is trite law that a party may raise any point of law at any stage of the proceedings and that points of law should be determined at the outset because of their potential, if successful, to dispose of cases without the need for their determination on the merits – See: ***Mukisa Biscuit Manufacturing Company Ltd v. West End Distributors Ltd*** [1969] EA 696 .

On examination of the written and oral submissions, however, we find that the issue raised was not a pure point of law but rather an issue requiring evidential proof before it could be determined. Counsel for the 2nd Respondent and for the Applicants both referred us to the evidence already on record, including the affidavits of The Attorney General, Hon Peter Nyombi, Hansards of Uganda's Parliament and other evidence to prove their respective and opposing arguments.

Although the issue raised by Counsel for the 2nd Respondent was not a pure point of law we find, nonetheless, that it has to be determined at the outset because, it would dispose of the Reference if it is determined in favour of the 2nd Respondent.

We have carefully considered the evidence and the rival submissions on this matter and have the following to say:

It is not in dispute that on 30th May 2008, the Constitutional Court of Uganda in the ***Oulanyah Case*** made declaratory orders impugning the Rules which are the major subject of this Reference. The Constitutional Court after considering the issues in the Petition declared, inter alia, that;

“2. Rule 11(1) Appendix B rule 3, 10 and 11 of the Parliamentary Rules of Procedure of Parliament are inconsistent with Article 21 (1), 2 of the Constitution.
3. Rule 11(1) Appendix B rule 11 (1) of the Parliamentary Rules of Procedure is inconsistent with Article 74(4) (5) of the Constitution and is null and void.

- 4. Rule 11(1) Appendix B rule 3, 10 and 11 of the Rules of Procedure of Parliament of Uganda is inconsistent with Article 89 (1) and 94(1) of the Constitution and is therefore null and void**
- 5. The Parliament of Uganda as the Electoral College did not carry out any election for members of the East African Legislative Assembly as required by Article 50 of the Treaty and Article 89 of the Constitution ...”**

For clarity's sake, the impugned Rules provide as follows:

- i) Rule 11(1) provides that elections of Members of EALA, “shall reflect the proportional party membership based on numerical strength of the Parties in the House and take into consideration gender and other shades of opinion”, and;**
- ii) Rule 3 of Appendix B provides that “elected members of the Assembly representing Uganda shall be nominated by the Parties or Organisations represented in the House on the basis of proportional party membership taking into consideration the numerical strength of the parties or organisations and gender” and;**
- iii) “rule 10 provides that “the Speaker shall announce to the House the nominations of members to the EALA”**
- iv) “rule 11 provides that “As soon as the Speaker announces the names of the elected members the Clerk shall publish the names in the Gazette”.**

It is common ground that the Attorney General applied for stay of execution of that Order which was granted on the 23rd June 2008 and is still in place to date. The Attorney General also appealed the case on the 12th May 2009 and it is further common ground that this Appeal has not been heard to date. What is clear from the foregoing is that the impugned Rules are still law in Uganda.

Counsel for the Applicants also invited the Court, in written and oral submissions, to take judicial notice of the fact that Hon Jacob Oulanyah, the Petitioner in Constitutional Petition No 28 of 2006 (referred to above), is no longer an Independent, as he has since joined a political party, and it is likely that he is no longer interested in the Petition. Counsel for the 2nd Respondent did not contradict this submission. We therefore, take judicial notice thereof.

In regard to the assertion that amendments of the Rules are ongoing, we acknowledge the affidavit of the Attorney General and its contents but with due respect we do not find it sufficient to resolve the inaction complained of. Indeed the Hon Attorney General in the said affidavit deponed, inter alia, that while he was Chairperson of the Rules, Privileges and Discipline Committee of the 8th Parliament, the Committee;

“.....in recognition of and pursuant to the decision of the Constitutional Court of Uganda in Constitutional Petition No. 28 of 2006 Jacob Oulanyah Vs The Attorney General, the Government of Uganda commenced the process of amending the Rules of Procedure of the Parliament of Uganda to conform to the East African Treaty and the Constitution of Uganda.” This was on September 20th 2011.

Exactly five months later, on the 21st February 2012, The Deputy Attorney General, Hon Ruhindi Fredrick, when queried in Parliament about the **Oulanyah Case** appeal in the Supreme Court, told the House that they (the Attorney General's Chambers);

“... did not abandon the Appeal in the Supreme Court. We have had challenges in the Supreme Court and sometimes due to problems of quorum ... for Judges to sit in the Supreme Court. It has always been an issue of resources ... but it was actually not the Attorney General abandoning an Appeal.” (Official Report of Parliament, **1st Session, Third Meeting, at p 2524**)

In our considered view, these contradictory statements coming not only from the same office, that of the Chief Legal Advisor to the Government, are glaringly short on clarity and leave even a trusting beneficiary of the amendments in serious doubt.

Furthermore, during the hearing of the Reference, Counsel for the 2nd Respondent told the Court that the process of amending the 2006 Rules started prior to May 2011 and that:

“... the Rules of 2012 are in the process of being completed” and urged the Court to consider the matter settled. In respect of the stay of execution, in place since the Oulanyah case, Counsel submitted that;

“the stay may serve only the purpose of staying but the direction and the orders given in the Jacob Oulanyah Case are being put into place by the 2nd Respondent”

The above submissions of Counsel, with respect, reinforce, rather than dispel, doubt. Why a straightforward amendment which started prior to 2011 should still be; “*in the process of being completed*” or “*being put into place*” or “*in the course of debate*” or “*in the process of amendment.....*”, is difficult to fathom.

In the premises, we too find them devoid of any promise for an intending beneficiary such as the Applicants.

On whether the matter could have been addressed administratively, we think, indeed it could because it appears to be simple. We however do not agree with Counsel for the 2nd Respondent that the Applicants are at fault for resorting to this Court. The reasons they advanced are convincing. On the contrary, this dispute looks, to us, like one which the Attorney General had not only the power but also the duty, *suo motu* to resolve, or help resolve, administratively, given his duties under Article 119 of the Constitution of Uganda. That he did not do so since the ***Oulanyah Case*** to date, we think, he should shoulder the blame and not seek to conveniently shift it to the Applicants.

We find and hold, therefore, that the instant Reference is neither moot, anticipatory nor an abuse of court process. It is rather a proper Reference grounded on the facts that the said 2006 Rules of Procedure are still law, efforts to amend them are not promising, an appeal against their nullification is still in place, a next round of EALA elections is fast approaching and it is the Applicants’ legitimate fear that the kind of election that happened in 2006 can happen again, to their disadvantage.

The objection is accordingly overuled.

While canvassing this point, Counsel for the Applicants, invited us to consider and determine what the substance of the amendment of the Rules, to make them conform to Article 50 of the Treaty should be. One of the Hansards of the Parliament of Uganda filed in evidence also indicated that the Parliament of Uganda at one time expressed similar sentiments. (See **Official Report of the Proceedings of Parliament, 1st Session, 16th Sitting, Third Meeting at p.2614.**)

We note as well that in a letter dated 27th March 2012 to the Registrar of this Court, to which Counsel for the 2nd Respondent alluded during oral submissions, the Deputy Attorney General, Hon. Fredrick Ruhindi, stated in one of its concluding paragraphs, inter alia, that;

“Parliament resolved that the Attorney General should seek guidance on the interpretation of Article 51(1) in respect of the application by Legal Brains Trust.....”.

With due respect, the letter was not of much use to us because it reached the court record by a procedure unknown to the Court’s Rules of Procedure and, as such, it lacked any ring of appropriateness. We did not attach evidential value to it.

In any event, the Treaty in Article 50 provides, inter alia, that elections of EALA members shall be conducted; ***“....in accordance with such procedure as the National Assembly of each Partner State may determine”.***

This Court has reiterated this position before- See ***Prof Peter Anyang Nyong’o and others vs The Attorney General of Kenya and 2 others, Reference No 1 of 2006, Christopher Mtikila v The Attorney General of Tanzania and the Secretary General of the East African Community, Reference No 2 of 2007.*** We do so even now.

Further it is an agreed point in this Reference that ***“the election of members of the East African Legislative Assembly from the Republic of Uganda is the preserve of the National Assembly of the Republic of Uganda.”***

We, therefore, do not consider that it is the Court’s duty, at this juncture, to give guidance to or interpret for the Legislature of Uganda on what does or does not constitute compliance with Article 50 or Article 50 (1) of the Treaty because it is not the issue in contention. The issue about the Rules in this Reference is that they have not been amended to conform to Article 50 of the Treaty since the **Oulanyah Case** and there is no tangible promise that they will be. We shall say something about the matter later in this judgment.

8 Consideration of the agreed Issues:

Issue No. 1.

Whether, or not, the 1st Respondent has failed to supervise the Government of the Republic of Uganda to ensure that its Parliament amends its Rules of Procedure for the election of Members of the East African Legislative Assembly.

The Applicants' complaints above, about which the Secretary General is alleged to have taken no action, are contained in a letter from the Democratic Party, dated 27th July 2011, copy of which is at page 125 of the Reference, addressed to the Secretary General by the 2nd Applicant. The letter draws attention of the Secretary General to the Rules of Procedure of election of members of EALA and asserts that the "... *provisions under the rules are an outright infringement of the East African Treaty 1999 ...*" (sic) and goes on to explain why they are an infringement. The purpose of the letter, to quote from its last paragraph, is as follows;

***"The purpose of this letter is to require your good office to conduct your supervisory role of the Community buttressed in Article 29 (1) of the Treaty and accordingly prevail upon Uganda as a Partner State to amend its rule 11 (1) for the election of members of the East African Community (sic) attached as appendix B to the rules of Procedure of the Parliament of the Republic of Uganda for purposes of strict adherence to Article 50 (1) of the Treaty in particular with regard to our quest for representation to the Assembly and the attendant manner and conduct of the elections as preparations by intending candidates are underway."* (sic)**

The complaints contained therein are, in our view, that;

- a) the Secretary General was requested to prevail upon Uganda to amend its rules providing for elections to EALA, to adhere to Article 50 of the Treaty;
- b) the Democratic Party intends to be represented in the EALA; and
- c) that preparations by intending candidates are underway.

We find that points (c) and (d) that were agreed at the Scheduling Conference (supra) seem to show that the Secretary General cannot be blamed for inaction or *loud silence* in this Reference.

We find the alleged want of supervision on the part of the Secretary General to ensure that the Rules in question are amended unsustainable in the face of the Parties' agreement, above, that the Rules were declared null and void in the **Oulanyah Case** and that the process of amending them is ongoing. It would be unjust, in our view, to fault the Secretary General for not supervising or following up on some process inside a Partner State which, the parties, including the one complaining, agree is being undertaken by the Partner State.

The alleged want of action or inaction on the part of the Secretary General as Ugandan Members of EALA are "*about*" to be elected using the impugned Rules in contravention Article 50 of the Treaty also, in our view, fails to stand because those elections have not taken place, and, apart from assertions from both the Applicants and the 2nd Respondent's Counsel, we were not shown evidence that they are *about* to take place. In the result, we find no merit in the allegations that the Secretary General has failed to supervise the Republic of Uganda and its Parliament to ensure that they amend the said Rules of Procedure or that he has taken no action as EALA members of the Republic of Uganda are about to be elected using the impugned Rules. We do not find it useful to examine the rest of the arguments.

The issue is resolved in the negative

We observe, however, that we did not get any evidence in the written or oral submissions about what the Secretary General did after receiving the Democratic Party's letter. Mr Kaahwa, Counsel for the 1st Respondent did not inform us of a particular action that the Secretary General took, that is, whether he responded to the letter and how; whether he did not respond to it and why; or whether he took any step to verify the claims contained therein and what findings he made.

While we would not consider such inaction as a Treaty violation in this particular Reference due to its particular factual situation as explained above we are aware that it can constitute a violation under a different set of facts.

We would, therefore, encourage the Community Secretariat to establish, as a matter of administrative principle, a standard practice of following up on allegations of treaty

infringements and/or violations once it receives formal communication about the same and to act as appropriate including providing feedback to the complainant. That would be, in our view, a good administrative act that would not overly tax either the Community Secretariat or the Secretary General.

Issue No. 2.

Whether or not the Applicants are entitled to the declarations sought.

In this Reference the Applicants sought a number of Declarations. At the outset we briefly examine the law on Declarations which we intend to be guided by in determining the issue.

Black's Law Dictionary defines "**declaration**" as:

"A formal statement, proclamation or announcement ..." **Black's Law Dictionary Ninth Edition at p.467)**

Hood Phillips and Jackson describe the objective of declarations thus; "*An action for a declaration asks for a "declaration of right". It may be brought ... in the Court even though no damages or other relief is claimed ...*" – See **Constitutional and Administrative Law, Hood Phillips and Jackson, Eighth Edition, at p.735.**

In **Cox V. Green [1996] Ch. 216**, Court observed that for a declaration to issue "...there must be a justifiable issue", and in a number of other precedents See (**Loel v. Sanger [1949] Ch. 258**, **Mellstram v Garner [1970] 1 W.L.R. 603** it has been held that the remedy of declaration cannot be brought in order to "... ask hypothetical questions". In **Bennet v. Chappel [1966] Ch. 391, CA**. Court held that, "*The Court, in its discretion, will not grant a declaration unless the remedy would be of real value to the plaintiff*". In **Williams v Home Office (No. 2) 1981 1 ALL ER 1211, Tudor Evans J**, held that, "*The Court will not grant declarations which are academic and of no practical value*".

In light of the above authorities we will examine the declarations sought in the order in which the Applicant listed them and which we have reproduced elsewhere above.

In prayers a, b and c the Applicants seek declarations that the impugned Rules contravene various Articles of the Constitution of the Republic of Uganda.

We find that the issue of whether the said Rules contravene any Articles of the Constitution of the Republic of Uganda is, in our view, an issue to be determined by the appropriate national courts in Uganda and we decline the invitation to assume that role.

In the result the declarations sought in (a), (b) and (c) cannot be granted.

In prayer (d) the Applicants seek a declaration that the said Rules of 2006 do not define *“election in its true sense ...”*

Since it is a point of agreement that the Rules are in the process of being amended it would be merely academic and of no practical value to the Applicants to grant such a declaration- (See: Bennet Vs Chappel (supra))

In (e) the Applicants seek a declaration that the inaction of the Uganda Parliament to amend the said Rules to conform to Article 50 of the Treaty constitutes an infringement of the fundamental principles enshrined in the Treaty.

It was agreed at the Scheduling Conference that the Parliament of the Republic of Uganda is in the process of amending the Rules. We find that it would be hypothetical to grant a declaration such as is being sought-(See: Mellstram vs Garner (supra).)

In prayer (f), briefly, the Applicants are seeking a declaration that the inaction and loud silence by the Government of Uganda and the Parliament of Uganda in not amending the rules in accordance to Article 50 (1) of the Treaty is an infringement of the Article.

The essential requirements for EALA elections provided in Article 50 of the Treaty are that:

- the National Assembly shall conduct an election;
- sitting members of the Assembly are not eligible;
- elected members shall be nine;
- the elected members shall represent, as much as is feasible:-
 - a)the political parties in the National Assembly;
 - b)shades of opinion;
 - c)gender; and
 - d)other special interest groups;
- the procedure for elections shall be determined by the National Assembly.

Any election, or rule of procedure for election, of EALA members that departs from the above clear requirements risks contravening the Treaty.

We also note that the Constitutional Court in the **Oulanyah Case** decided, inter alia, that; (per Okello JA, as he then was):

“on issues 1-4, I concur with the reasoning and conclusions of Mpagi Bahigeine, JA. I agree that for the reasons she has given that Rule 11(1) of the rules of Procedure of the Parliament of Uganda, 2006 which provided that election of the members of the East African Legislative Assembly representing Uganda, be conducted under Appendix B r3, is inconsistent, with all the stated Articles of the Constitution. As seen above r3 of Appendix B omitted to provide for “consideration of other shades of opinion in the House when electing Members of the East African Legislative Assembly representing Uganda. This is a serious omission because it is the basis of the Petitioner’s complaint. It contradicted the very clear provision of Rule 11 (1) of the Rules of Procedure of Parliament of Uganda, 2006 and Article 50 (1) of the Treaty”.

The Learned Judge went on to state that Rule 10 of Appendix B also failed to provide the mode of election by Parliament and stated that;

“.....this omission is contrary to Article 50(1) of the Treaty which provides that the elected members of the EALA representing a Partner State shall be elected by the National Assembly of the Partner State...”

This was on May 30th, 2008. Four years down the road, nothing has been done by the 2nd Respondent apart from “recognising” the **Oulanyah Case** and making commitments to amend the Rules.

Clearly there has been an inordinate delay to amend the Rules on the part of the 2nd Respondent. Without doubt the delay has locked the Applicants out of the EALA and has, understandably, frustrated them. It is also a delay which, if not addressed, could adversely impact the commencement of the next EALA term. Bluntly put, the conduct of the Republic of Uganda has imposed this costly and avoidable Reference on the Applicants and, if the issue of amendments is not addressed with expedition and in conformity with the Treaty, it is likely not only to

stall the commencement of the next EALA term but also result in further endless litigation.

The 2nd Respondent also seems to have exploited this delay for as long as there was a legal possibility. One result of this delay, for instance, is that the legal basis of the current EALA members from Uganda has comprised of the disputed election, the judgment nullifying that election, the stay of execution of that judgment and the unheard appeal against that judgment. Given that the current EALA term is almost at an end, we think that if the appeal eventually goes for hearing and determination it will, in almost all likelihood, be determined after the expiry of the current term.

Whether this was achieved by design, sheer luck or coincidence, the 2nd Respondent's Counsel were not able to explain to us. What appears natural to us, though, is that we cannot fault the Applicants for doubting, legitimately so, in our view, the 2nd Respondent's intentions given the way the whole process played out. The Applicants' dilemma is that if this could happen on the 2nd Respondent's watch, and for four years it has not been resolved, it can happen again unless the Applicants are vigilant enough to outsource intervention which is what they did in the instant Reference.

In light of the facts that it was agreed at the Scheduling Conference that election of EALA members is a preserve of the Republic of Uganda; that the impugned Rules of Procedure were declared null and void by the **Oulanyah Case**; that the amendment process thereof is ongoing; and that the 2nd Respondent assured this Court that the upcoming EALA elections will be conducted using amended Rules that conform to Article 50 of the Treaty, we find that it is only fair to give the 2nd Respondent the benefit of doubt by, inter alia, not granting the declaration sought. We say so despite our finding that the 2nd Respondent's conduct regarding amendment of the 2006 Rules leaves a lot to be desired and is the cause of the filing of this Reference.

The Community Court should, in our humble view, support positive and forward looking programs for the future rather than dwell on negative and inward looking agendas that are past.

In any event, we think that the grant of such a declaration would not be of real value to the Applicants- see *Williams Vs Home Office (supra)*.

Accordingly we decline to grant the declaration sought.

In (g) the Applicants seek a declaration that the Secretary General has failed to supervise the Government of Uganda to ensure that Parliament amends its laws to make them conform to Article 50 of the Treaty.

In view of our findings on Issue No. 1 this declaration, too, is not granted.

In (h) The Applicants seek orders restraining and prohibiting the EALA, the Attorney General of Uganda and the Parliament of Uganda from conducting and carrying out any elections under the Rules of Procedure of the Parliament of Uganda, 2006 until those Rules are amended to conform to Article 50 of the Treaty.

We think that this is one remedy that would be of real practical value to the Applicants, yet occasion no prejudice to the either Respondent, since the 2nd Respondent is in the process of amending the 2006 impugned Rules of Procedure of Parliament and EALA elections have not taken place. We have said enough elsewhere above why this is the case.

The declaration sought is accordingly granted.

In (i) the Applicants seek orders that the Attorney General of the Republic of Uganda be held vicariously liable for the actions of the Government and Parliament of the Republic of Uganda.

We note that apart from mere assertions the Applicants did not show any particulars of omission or commission for which we can hold the Attorney General vicariously liable.

Accordingly we considered the prayer abandoned.

In prayer (j) the Applicants prayed for costs. Having found as above we think it is fair and equitable that they should get the costs from the 2nd Respondent.

9. Decision of the Court

In view of our findings above, we find and hold that the Applicants have made out a case that the 2006 Rules do not conform to the Treaty. Accordingly, they are entitled to orders that will restrain the Parliament of the Republic of Uganda from conducting the EALA elections unless and until they amend the impugned Rules to conform to Article 50 of the Treaty.

In conclusion, **IT IS HEREBY ORDERED THAT:**

1. The Parliament of the Republic of Uganda, the Attorney General of the Republic of Uganda, the EALA are restrained and prohibited from conducting and carrying out any elections of members to the EALA, assembling, convening, recognising, administering Oath of Office or otherwise howsoever presiding over or participating in the election of the Representatives of Uganda and recognising of any names of nominees as duly nominated and elected to the EALA until the Rules 11(1) and Appendix B r 3, 10 and 11 of the Rules of Procedure of the Parliament of Uganda, 2006 are amended by the Parliament of the Republic of Uganda to conform to the provisions of Article 50 of the Treaty for the Establishment of the East African Community.

2. The case against the 1st Respondent is dismissed with no orders as to costs.

3. The 2nd Respondents shall pay the costs of this Reference to the Applicants.

**DATED, AT ARUSHA
THIS 10th DAY OF MAY, 2012**

.....
**Busingye Johnston
PRINCIPAL JUDGE**

Mary Stella Arach-Amoko
DEPUTY PRINCIPAL JUDGE

Mkwawa John
JUDGE

Butasi Jean Bosco
JUDGE

Isaac Lenaola
JUDGE