IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

APPEAL 4 OF 2012

(CORAM: H.R. NSEKELA, P; P.K. TUNOI, VP; E.R KAYITESI,

L. NZOSABA AND J.M. OGOOLA, JJA)

BETWEEN

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

AND

THE ATTORNEY GENERAL OF

THE REPUBLIC OF UGANDA ..... RESPONDENT

(Appeal from the Judgment of the First Instance Division at Arusha Justices J. Busingye PJ, M.S. Arach-Amoko, DPJ, J. Mkwawa, J.B. Butasi and I. Lenaola JJ dated 30th March 2012 in Reference No. 10 of 2011)

JUDGMENT OF THE COURT (19TH MAY, 2012)

Background

1. This appeal arises from the decision of the First Instance Division given on 30th March 2012 by which the court dismissed a Reference dated and lodged in that Court on 15th December 2011 by the appellant, Legal Brains Trust (LBT) Limited.

2. The Appellant describes itself in the Reference as a company limited by guarantee incorporated under the Companies Act of Uganda. One of its objects is to defend and promote rule of law, access justice, human rights, democracy and good governance through effective use of existing mechanism at the domestic and international level while the respondent is the Principal Legal Adviser of the Government of Uganda.

3. The Reference which was brought under Articles 23, 27 and 30 of the Treaty for the Establishment of the East African Community (the Treaty) and Rules 1(2) and 24 of the East African Court of Justice Rules 2010 sought the interpretation of Article 51(1) of the Treaty which provides that:

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

4. The circumstances giving rise to this appeal can be stated quite simply and briefly. Following the conflicting interpretations of Article 51 (1) of the Treaty Establishing the East African Community ("the

EAC Treaty"), the Rt. Honorable the Speaker of the Parliament of Uganda wrote a letter requesting the Attorney General of the Republic of Uganda to seek an Advisory Opinion from the East African Court of Justice ("EACJ"), pursuant to Article 36 of the EAC Treaty. The Attorney General did not seek the requested Advisory Opinion. Instead, he responded with a written legal opinion of his own on the matter – to the effect that Article 51(1) prescribes a limit of two terms of 5 years each for every elected Member of the East African Legislative Assembly ("EALA").

5. Thereupon, somehow the Applicant (now Appellant) surfaced as an "aggrieved" party; and lodged a "Reference" in the First Instance Division of this Court, seeking that Court's interpretation of Article 51(1) of the Treaty. The First Instance Division obliged; and, in its judgment of 3rd April 2012, opined that , indeed, the words "**eligible for re-election for a further term of five years**" appearing in Article 51(1), limits an EALA Member's elected tenure to two terms of 5 years each, for a total of 10 years. Aggrieved by the judgment of the First Instance Division, the Appellant lodged this appeal to this Appellate Division, citing the following seven grounds of appeal:

> *(i) The learned justices of the First Instance Division erred in law in holding that isolating and giving the words in issue their ordinary meaning is against the principle that the Treaty shall be interpreted in good faith and in so holding reached a wrong conclusion in law and occasioned a miscarriage of justice.*

(ii) The learned justices of the First Instance Division erred in law when interpreting the terms of the Treaty in context held that because the words "further term" have a definite period of time attached to them, there can be no other terms thereafter and in so doing occasioned a failure of justice.

(iii) The learned justices of the First Instance Division erred in law in failing to make a finding on arguments on non consecutive terms which would render the conclusion arrived at absurd, against the intentions of the framers and therefore offending the rules of treaty interpretation.

(iv) The learned justices of the First Instance Division erred in law when they construed examples of ordinary meaning of the phrase in issue as an attempt by the appellant to rely on such examples as legal authorities, and therefore failed to consider the ordinary meaning given to the phrase in issue thereby going against a rule of treaty interpretation and occasioning a failure of justice.

(v) The learned justices of the First Instance Division erred in interpretation when they equated the use of the word "shall" in Article 51(1) to use of the same word in Article 25 (1) and 68 (4) of the Treaty and came to the conclusion that Article 51(1) creates a fixed term in the same way Articles 25(1) and 67(4) do and in so finding went against the intention of the framers of the Treaty.

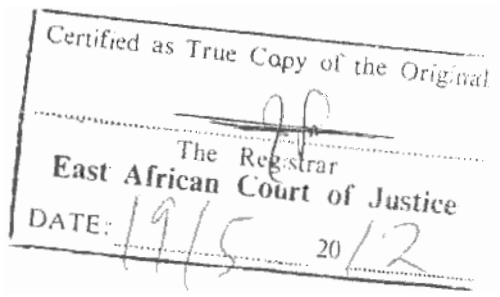
(vi) The learned justices of the First Instance Division erred in law in interpreting the word "tenure" to include disqualification after having clearly held that tenure means the period when one is holding an office and in so doing occasioned a failure of justice.

(vii) The learned justices of the First Instance Division erred in law when they failed to make a finding that letter "a" is not limited to one meaning and in the context of the sentence could not import the meaning arrived at."

6. At the hearing of the appeal, the Court held a scheduling conference – with all the counsel present- in which it was agreed to collapse all the seven grounds of appeal into one ground only-namely: Whether the learned judges of the First Instance Division erred in their interpretation of Article 51(1) of the EAC Treaty? Nonetheless, in order to properly address ourselves to that specific ground of appeal, it was necessary to clear our minds as to how and why this matter came before this Court in the first place; and, in particular, whether (given the standing of the Parties) the matter was properly before us; and whether the Court may entertain the matter and adjudicate upon it at all? In this regard, two fundamental points of law need to be addressed /clarified:

(1) Whether the Applicant/Appellant had *locus standi* to bring this matter before this Court under Article 30 or Article 36 of the EAC Treaty?

(2) Whether the matter involved a real "dispute" that was capable of being adjudicated by a court of law; or whether it was merely a speculative reference?



7. In the following paragraphs of this judgment, we consider the issue of jurisdiction under Article 30 of the Treaty; *locus standi* under Article 36 of the Treaty; and the speculative nature of the purported "Reference".

References under Article 30 of the Treaty

8. This instant Reference was lodged under Articles 23, 27 and 30 of the EAC Treaty and Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure (2010). Among the Treaty Articles, Article 30 is the one which confers jurisdiction on this Court to determine references lodged by legal and natural persons, such as the Appellant, who are resident in the Partner States. Paragraph 1 of that Article states as follows:

> *" Subject to the provisions of article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an Institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or an infringement of the provisions of this Treaty..."*

9. From a reading of that provision, it is clear that under Article 30, the cause of action must be founded on the failure of a Partner State or an Institution of the Community to apply the Treaty. In the instant case, the Appellant did not complain of any failure in the application of the Treaty, neither by a Partner State nor by an Institution of the Community. He alleged that, in reply to a request by the Speaker of the Parliament of Uganda for the Respondent (Attorney General of Uganda) to seek an advisory opinion from this Court, the Respondent declined to forward the

request and, instead, interpreted the Treaty himself. The Appellant averred that the fact of the Respondent's advising the Speaker on the interpretation of Article 51(1), constituted an infringement of the Treaty.

10. Article 30 of the Treaty opens the doors of this Court to any legal or natural person who is resident in the Community and who wishes to challenge the legality of an Act, regulation, directive, decision or action of a Partner State or an Institution of the Community. In the instant Reference, no Act, regulation, directive, decision or action was ever alleged to have been made or taken by the Republic of Uganda in violation of the Treaty. No "illegality" of any such decision or action was cited or even alluded to. No Article of the Treaty was mentioned as having been infringed by the Partner State. The only allegation on which the so called Reference is founded, is the advice that the Attorney General gave to the Speaker of the Parliament of Uganda on the interpretation of Article 51 (1) of the Treaty. However, legal advice tendered by the Attorney General of Uganda to institutions of the Republic of Uganda (such as the Parliamentary Speaker), is not in itself a justiciable or actionable matter before this Court. After all, the Attorney General is, under the Constitution of Uganda, the Chief Legal Advisor to the Government of Uganda. To that extent, the giving of legal advice by the Attorney General would, on the face of it, appear to be the sort of decision or action that is contemplated under Article 30 (3) to be "reserved" to an institution (the Office of the Attorney General) of a Partner State. [In any event, whatever advice the Attorney General tenders may be taken or declined by the advicee].

11. In consequence, we find that the Appellant did not fulfill the necessary requirements for lodging a Reference in this Court under Article 30 of the Treaty.

Accordingly, there was no reference at all that this Court could properly entertain or adjudicate upon under Article 30 of the Treaty.

Advisory Opinion under Article 36 of the Treaty

12. The Rt. Honourable the Speaker of the Parliament of Uganda in her letter AP 11/161/01 of 25th August 2011, requested the Honourable Attorney General of Uganda, in accordance with Article 36 of the Treaty, to:

> *"seek an advisory opinion on the interpretation of Article 51 (1) [of the EAC Treaty] from the East African Court of Justice."*

13. That request, if adhered to, would have enabled recourse to this Court through the second available method by which this Court is approached. In the event, the Attorney General chose not to access this Court via the advisory opinion method of Article 36. He chose, rather,, to tender his own legal opinion on the matter. Thereupon, the Applicant/Appellant chose to access this Court, but through the first method of recourse – namely, a Reference brought pursuant to Article 30 of the Treaty. The requirements and procedure for lodging a Reference under Article 30 have been discussed in detail elsewhere in this Judgment. In what follows, we will consider the requirements and process that would have been necessary for requesting an advisory opinion under Article 36 of the Treaty. Paragraph 1 of that Article provides as follows:

"1. The Summit, the Council or a Partner State may request the Court to give an advisory opinion regarding a question of law arising from this Treaty which affects the Community, and the Partner State, the Secretary General or any other Partner State shall in the case of every such request have the right to be represented and take part in the proceedings."

14. First, the request for an advisory opinion is initiated by either the Summit of the Heads of State/Government, or the Council of Ministers of the Community, or alternatively by a Partner State of the Community. It is thus evident from this process that legal or natural persons – such as the Applicant/Appellant in the instant case – are excluded from requesting an advisory opinion from the Court. .

15. Second, when a request for an opinion is properly made under Article 36 of the Treaty, the Partner State in question, the Secretary General of the East African Community, and all other Partner States "have the right to be represented and to take part in the proceedings" – see Article 36 (1). For this reason, Article 36 (3) stipulates that:

'Upon receipt of the request under paragraph 1 of this Article, the Registrar shall immediately give notice of the request, to all the Partner States, and shall notify them that the Court shall be prepared to accept, within a time fixed by the President of the Court, written submissions, or to hear oral submissions relating to the question."

16. Third, and even more significantly, under Rule 75 of the EACJ Rules of Procedure 2010, a request for an advisory opinion is required to be

lodged in and be entertained only by the Appellate Division of this Court. That Rule provides in relevant parts, as follows:

> *"75. (1) A request for an advisory opinion under Article 36 of the Treaty shall be lodged in the Appellate Division ...*
>
> *(2) ...the Registrar shall immediately give notice of the request to all the Partner States and the Secretary General.*
>
> *(3) The Division may identify any person likely to furnish information on the question and shall direct the Registrar to give notice of the request to such person.*
>
> *(4) The Registrar shall in the notice ... invite the Partner State, Secretary General and such other person to present written statements on the question ...*
>
> *(5) ...the Registrar shall send a copy of each such written statement to the Parties mentioned in sub-rule (4) for comments ...*
>
> *(6) the Division shall decide whether oral proceedings shall be held ...*
>
> *(7) ...*
>
> *(8) The Division shall deliver its advisory opinion in open court..."*

17. It is quite evident, therefore, that the procedure for seeking and prosecuting an advisory opinion in this Court was not at all contemplated by either the Applicant or the Respondent – let alone pursued – in this instant

case; and no argument has been made, or claim attempted to that effect. Accordingly, the purported case that was brought before the First Instance Division under the guise of a Reference, had no basis or standing whatsoever to be lodged, to be entertained and to be adjudicated in that Court.

Hypothetical Speculative Case

18. It is also crystal clear that in the circumstances of this matter, the advisory opinion approach should have been the proper approach to pursue for the resolution of the instant matter. This is so because the reference that was filed in the First Instance Division was utterly deficient and improper as a Reference under Article 30 of the Treaty. Quite apart from the incapacity of the Applicant – a legal person – to lodge and prosecute a matter which under Article 36 (which can and should under that Article be initiated and prosecuted only by the Summit or the Council or a Partner State), the matter brought by the Applicant was not a "**dispute**", *strictu sensu*.

19. In this regard, it is a cardinal doctrine of our jurisprudence that a court of law will not adjudicate hypothetical questions – namely, those concerning which no real, live dispute exists. A court will not hear a case in the abstract, or one which is purely academic or speculative in nature – about which there exists no underlying facts in contention. The reason for this doctrine is to avoid the hollow and futile scenario of a court engaging its efforts in applying a specific law to a set of mere speculative facts. There must be pre-existing facts arising from a real live situation that gives

rise to, for instance, a breach of contract, a tortuous wrong, or other such grievance on the part of one party against another. Absent such a dispute, the resulting exercise would be but an abuse of the court's process.

20. A couple of cases from the European Court and the Supreme Court of Nigeria, representing, respectively, the international and the municipal dimension of this phenomenon, will help demonstrate the importance and application of this doctrine:

(1) In its judgment of 9 February 1995, the Sixth Chamber of the European Court in **Société d'Importation Edouard Leclerc-Siplec v TFI Publicité SA and M6 Publicité SA – Reference for a preliminary ruling – Case C – 412/93, European Court Reports 1995 Page I-00179**, the Court held that:

> "*12 The Court has nonetheless considered that, in order to determine whether it has jurisdiction, it is necessary to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in preliminary ruling proceedings requires the national court to have regard to the function entrusted to the Court of Justice, which is to contribute to the administration of justice in the Member States and not to give opinions on general or hypothetical questions (judgments in Case 149/82 Robards v Insurance Officer [1983] ECR 171 and Meilicke.*"[emphasis added]

(2) Similarly, in its judgment of 3 February 1983, the Third Chamber of the European Court in the **Robards v Insurance Officer** case (*supra*), the Court in a preliminary ruling held that:

"19 However, the task assigned to the Court by Article 177 of the EEC Treaty is not that of delivering opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. In this case, therefore, the interpretation of the provision in question should be confined to the case which is before the national court, namely that of a divorced spouse who has not remarried and is carrying on a professional or trade activity. It would be for the Commission and the Council to take the necessary measures in order to amend the provision in question if it appeared that such an amendment were necessary in order to enable other cases to be satisfactorily resolved."

(3) In **C.D. Olale v G. O. Ekwelendu (1989) LPELER-SC, 54/1988**, the Supreme Court of Nigeria held as follows:-

"The 3rd issue formulated by the appellant set out above is a hypothetical question and has not been given a nexus with the matters in the instant appeal. This Court has on several occasions declared and emphasized that the 1974 Constitution which established it has not conferred on it jurisdiction to deal with hypothetical, academic or political questions. So the Supreme Court does not deal with or determine hypothetical questions and will not, in this judgment, answer the question posed in the 3rd issue for determination." [emphasis added]

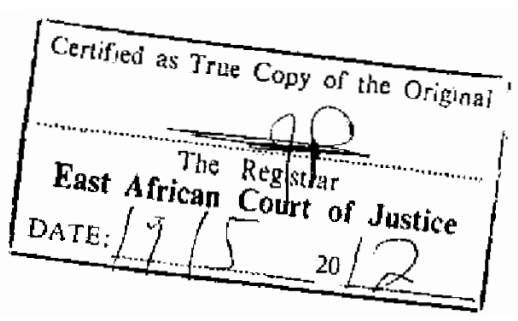
(4) In like manner, the Supreme Court of Nigeria in **Alhaji Yar'adua & Anor.v Alhaji Abubakar & Ors, Nigerian Weekly Reports, SC 274/2007**, held that:

"*The continued prosecution of this appeal by the appellants in view of available undisputed facts is clearly academic having been overtaken by events and, therefore, constituted a gross abuse of judicial process: Agwasim v Ojichie (2004) All FWLR (Pt. 212) 1600 (2004) 10 NWLR (Pt. 882) 613. One may ask – what kinds of order do the appellants want from this Court, now that the trial has been wholly completed and judgment delivered? Nothing, if I may answer. It is an abuse of process of court for a plaintiff to re-litigate an identical issue which had been decided again him: Onyeabuchi v LNEC (2002) FWLR(Pt.103) 453, (2002) 8 NWLR(Pt. 769) 417 at 443. So also where proceedings which were viable when instituted have by reason of subsequent events become inescapably doomed to failure as has this case. Merely withdrawing the appeal would have served the appellants from this situation.*

The Appeal is clearly lifeless, spent, academic, speculative and hypothetical: Union Bank of Nigeria v Alhaji Bisi Edionseri (1988) 2 NWLR (Pt. 74) 93; Ekwelendu (1989) 4NWLR (Pt.115) 326".[emphasis added]

21. Similarly, the US Supreme Court has considered at length this same issue of speculative cases. The following examples will suffice:-

(1) In **Re Pacific R. Commission**, 32 fed. 241, 225 the USA Supreme Court asserted that the US Constitution confers jurisdiction only in "cases and controversies", a position underlined again in **Muskrat -v- United State, 219, U.S. 346 (1911)**, thus:



"... that judicial power, as we have seen it, is the right to determine actual controversies arising between adverse litigants, duly instituted in court of proper jurisdiction ... (T) his attempt to obtain a judicial declaration of the validity of the act of congress is not presented in a 'case' or 'controversy' ... under the Constitution of the United States..."

The same line of judicial reasoning recurs in a much later decision, **Steel Co. aka Chicago Steel & Picking Co. –v- citizens for a better Environment,** 532 U.S. 83 (1998) in which the U.S Supreme Court thus stated;

"Article 111 (2) of the Constitution extends the judicial power" of the United States only to 'Cases' and controversies'. We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process."

(2) In the **Muskrat case**, the Supreme Court observed that in the famous case of **Marbury v Madison, Marshall CJ –**

"... was careful to point out that the right to declare an act of Congress unconstitutional could only be exercised when a proper case between the opposing parties (was) submitted for judicial determination ..."

(3) In the case of **Aetna Life Ins. Co. Vs Haworth, 300 U.S. 227,** the Court defined justiciable controversy as being distinct from:-

"a difference or dispute of a hypothetical or abstract character; from one that is academic or moot – one that is definite and concrete,

touching the legal relations of parties having adverse legal interest, … real and substantial controversy admitting specific relief through a decree of a conclusive character, was distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

22. In the instant matter, it is not contested at all that there was:

(a) no EALA election conducted in the Ugandan Parliament;

(b) no campaigns or contest for any such election; and

(c) no candidate(s) refused or stopped from contesting any such election, on the grounds of any expired term limit.

23. At best, what happened was mere speculation that the above scenario was likely to happen in the yet uncalled, un-announced elections. Such set of speculative circumstances produces not an "aggrieved" party"; nor, indeed, a real "dispute" that is justiciable in our courts of law.

24. In summary, the question raised in the instant case before this Court, was clearly hypothetical, academic, abstract, conjectural and speculative. It should not have been entertained by the Court below. We decline to adjudicate it for that reason; as well as for the reason of the Applicant's/Appellant's lack of *locus standi* (both under Article 30 and Article 36 of the Treaty).

Conclusion

25. From all the considerations discussed above, it is quite evident that:

(a) The matter brought to this Court by the Applicant/Appellant, lacked all the basic material requirements of lodging a reference under Article 30 of the Treaty;

(b) The Applicant/Appellant being a "legal/natural" person, not only lacks the standing to seek an Advisory Opinion under Article 36 of the Treaty; but , indeed, did not contemplate nor even advert to the possibility of doing so;

(c) The matter brought before this Court lacked any underlying factual situation capable of giving rise to any real dispute. For the Court to entertain any such matter, would amount to entertaining the academic, the abstract and the speculative – with all the attendant abuse of the court process.

26. In the result, this Court declines to entertain and adjudicate this matter. As there was no proper reference under Article 30; nor a request for an Advisory Opinion under Article 36; nor indeed, any real dispute in this matter, the judgment of the Court below is vacated as being moot. We make no order as to the costs of this Appeal and those in the Court below.

It is ordered accordingly.

DATED at ARUSHA this. 19th .....day of May, 2012

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The Registrar
East African Court of Justice
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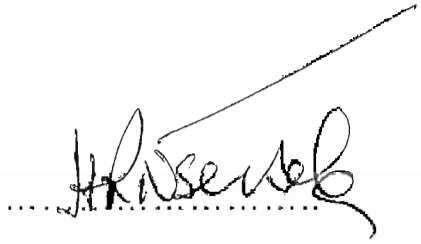
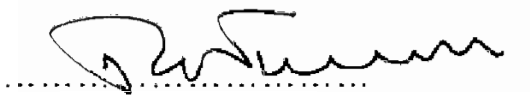
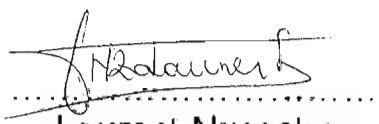


Harold R. Nsekela
President

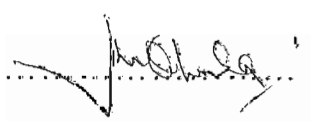


Philip K. Tunoi
Vice President

Emily R. Kayitesi
Justice of Appeal



Laurent Nzosaba
Justice of Appeal



James Ogoola
Justice of Appeal

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