IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

FIRST INSTANCE DIVISION

(CORAM: Jean Bosco Butasi, PJ; M.S. Arach-Amoko, DPJ; J. J Mkwawa, J; Isaac Lenaola, J, F. Ntezilyayo, J)

REFERENCE NO. 5 OF 2012

ABDU KATUNTU

(SHADOW ATTORNEY GENERAL

FOR THE OPPOSITION IN

THE PARLIAMENT OF UGANDA) ..... APPLICANT

AND

1. THE ATTORNEY GENERAL OF UGANDA

2. THE SECRETARY GENERAL

EAST AFRICAN COMMUNITY.....RESPONDENT

AND

1.HON.MARGARET NANTONGO ZZIWA ..... 1ST INTERVENER

2.HON. DORA BYAMUKAMA.....2ND INTERVENER

3.HON. BENARD MULENGANI.....3RD INTERVENER

4.HON. DAN KIDEGA.....4TH INTERVENER

5.HON. MIKE SEBALU.....5TH INTERVENER

6.HON. NUSURA TIPERU.....6TH INTERVENER

7.HON. SUSAN NAKAWUKI.....7TH INTERVENER

8.HON. CHRIS OPOKA.....8TH INTERVENER

9.HON. MUKASA FRED MBIDDE.....9TH INTERVENER

Date 25th November 2013

JUDGMENT OF THE COURT

Introduction

This is a Reference by one ABDU KATUNTU (hereinafter referred to as the "Applicant"). The Applicant is an elected Member of the Parliament of Uganda. He is also the Shadow Attorney General in the Parliament of Uganda.

The instant Reference was filed on May 28, 2012 and amended on June 22, 2012 to implead the Secretary General of the East African Community (hereinafter referred to as the " Second Respondent"). The Reference was filed under Articles 4(3); 9(1) (f); 23(1); 27(1); 29(1); 30(1); 38(1); 50 (1) of the Treaty for the Establishment of the East African Community and Rule 24(1) of the East Court of Justice Rules of Procedure (hereinafter referred to as " the **Treaty**" and " the **Rules**", respectively).

The Reference is supported by the affidavit of the Applicant himself sworn on June 20, 2012, that of Kenneth Paul Kakande sworn on August 29, 2012 and Hon. John Ken Lukyamuzi dated September 3, 2012.

The 1st and 2nd Respondents are the Attorney General of the Republic of Uganda and the Secretary General of the East African Community respectively. In opposition to the Reference, is the Response and the replying affidavits sworn on behalf of the 1st Respondent by Mrs. Jane Lubowa Kibirige, the Clerk to the Parliament of Uganda and Hon. Peter Nyombi, the Attorney General of the Republic of Uganda. The 2nd

Respondent on his part, in opposition to the Reference, relies on his Response which was filed on August 13, 2012.

It is also imperative to mention that on August 15, 2012, nine Interveners, namely, the Uganda Representatives to the East African Legislative Assembly (hereinafter referred to as the " EALA"), filed a Notice of Motion under Article 40 of the Treaty and Rule 36 (1) (d) of the Rules . This Court granted their Application on February 5, 2013. The Court also allowed the Interveners' supporting affidavit deponed by one Hon. Margaret Nantongo Zziwa (the 1st Intervener) to serve as the statement of intervention as provided under Rule 36(4) of the Rules. Further to the foregoing, the Interveners were allowed to make submissions.

Representation

Mr. Ladislaus Rwakafuuzi represented the Applicant while Ms. Robina Rwakoojo, Mr. Philip Mwaka, Mr. Elisha Bafirawala, Ms. Maureen Ejang and Ms. Eva Kavundu appeared for the 1st Respondent. Mr. Wilbert Kaahwa, learned Counsel to the Community appeared for the 2nd Respondent whereas Mr. Justin Semuyaba appeared for the Interveners.

BACKGROUND

It can be gleaned from the Applicant's pleadings that this Reference is predicated on conformity to Article 50 (1) of the Treaty which provides that:

> "***50(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 it is feasible, the various political parties represented 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, in 2006, the Parliament of the Republic of Uganda passed the Rules of Procedure for the election of members of the EALA. The Constitutional Court of Uganda in ***Hon. Jacob Oulanyah vs The Attorney General of The Republic of Uganda, Constitutional Petition No. 28 of 2006,*** subsequently annulled the Rules on the ground, *inter alia,* that they were contrary to Article 50(1) of the Treaty and that Parliament had divested itself of its duty to elect Members of the EALA and bestowed it on the political parties.

Since the said Rules were invalidated, it became necessary to make fresh rules for the election of members of the EALA for the 2012 elections.

During the debate, an issue arose as to whether all the six political parties represented in the Parliament of Uganda should send a member each to the EALA in adherence to Article 50(1) of the Treaty. The National Resistance Movement (NRM), which is the ruling political party, argued that not all the six political parties would be represented. The opposition, on the other hand, wanted all the six political parties to be represented. In order to resolve the disagreement, Parliament passed a Resolution that the Attorney General refers the matter to this Court for interpretation of Article 50(1) of the Treaty to enable Parliament to make amendments which are in conformity with the said Article.

It is apparent that the matter was not referred to this Court but Parliament went on to make the impugned Rules, hence this Reference.

The Applicant's Case

The Applicant's case is contained in the Amended Reference filed on June 22 , 2012, the affidavit sworn by himself on June 20, 2012, the affidavit of Kenneth Paul Kakande sworn on August 29, 2012 and that of Hon. John Ken Lukyamuzi sworn on September 3, 2012, as well as his submissions.

In summary, the Applicant's case is as follows:

Firstly, that the impugned Rules did not guarantee that all the six political parties represented in Parliament of Uganda would send representatives to the EALA.

Secondly, that the Rules further failed to guarantee that it shall be Parliament that shall elect members to the EALA.

Thirdly, that the Rules also failed to provide that the nominated candidates shall be gazetted. Subsequently, the NRM presented six persons to Parliament for election; the Democartic Party (DP) and the Uganda Peoples' Congress (UPC) both presented one candidate each for nomination and Parliament approved these candidates.

Consequently, the purported elections held on May 18, 2012 were not in accordance with Article 50 of the Treaty.

Fourthly, that the 2nd Respondent failed in his duty under the Treaty to stop the elections conducted by the Parliament of Uganda and the consequent swearing in of the nine elected EALA members on June 6, 2012.

It is on the basis of the foregoing that the Applicant sought the following declaratory orders:

" (a) A declaration that all the six political parties represented in the Parliament of the Republic of Uganda may each send a member to the East African Legislative Assembly.

(b) A declaration that the purported elections in the Parliament of the Republic of Uganda that took place on 30th May 2012 for the members of the East African Legislative Assembly are null and void.

(c) A declaration that the Secretary General of the East African Community the 2nd Respondent herein failed in his duties under the Treaty when he refused to stop the swearing in of the Members of the East African Legislative Assembly from Uganda.

(d)A declaration that Rule 13 (1) and (2) of the Rules of Procedure for the election of members of the East African Legislative Assembly adopted by the Parliament of Uganda is contrary to Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.

(e)An order that the elections of 6 members to the East African Legislative Assembly by and from the National Resistance Movement one of the 6 political parties having Members of Parliament in the Parliament of Uganda be set aside.

(f)An order that fresh rules of procedure for the election of members of the East African Legislative Assembly by the Parliament of Uganda be made providing that all the political parties having members in the Parliament of Uganda be represented by at least one member in the East African Legislative Assembly.

(g)An order that fresh elections be conducted by the Parliament of Uganda for the Members of the East African Legislative Assembly.
(h)Any other relief.
(i)An order awarding the costs of this reference to the applicant."

At this juncture, it is instructive to note, that on September 12, 2013, when the matter came up for hearing, Counsel for the Applicant abandoned prayers **(b), (c) and (e).**

Case for the 1st Respondent

The 1st Respondent's case rests on a response to the amended Reference filed on July 26, 2012 which was supported by an affidavit of Mrs. Jane Lubowa Kibirige, the Clerk to Parliament of Uganda together with that of Hon. Peter Nyombi , the Attorney General of the Republic of Uganda and submissions.

In a nutshell, the 1st Respondent's case is as follows:-

(a) That the Parliament of the Republic of Uganda amended and adopted Rules of Procedure for the election of Uganda's Representatives to the EALA, particularly Rules 13(1) and (2) and Appendix B.
(b) The 1st Respondent contended that the 2012 Rules of Procedure are in conformity with Articles 23(1), 27(1), 38(1) and 50(1) of the Treaty.
(c) The Rules enabled the various Political Parties represented in Parliament, shades of opinion, gender and other special interest groups to nominate any number of candidates to participate in the elections to the EALA and seventeen persons were nominated.

(d) That Rule 13(1) of Appendix B of the Rules of Procedure for the Election of the said members to the EALA permitted the various political parties represented in Parliament, shades of opinion, gender and other special interest groups to nominate candidates for elections to EALA.

(e) That pursuant to the Rules 13(1) of Appendix Appendix B, the NRM, DP, CP, UPC and the Independents all nominated candidates to contest for the elections to the EALA.

(f) That FDC and JEEMA opted not to nominate or otherwise participate in election process.

(g) That Rule 13(1) Appendix B of the Rules of Procedure for the Election of EALA members does not impose any restriction on the number of nominees to be forwarded by the various political parties, shades of opinion, gender and other special interest groups for election.

(h) That FDC having picked 20 nomination forms for purposes of nominating candidates to contest for the EALA elections, returned one Louis Dramadri as the duly nominated candidate for FDC.

(i) A total of seventeen nominees were forwarded to Parliament to contest for the nine slots reserved for Uganda to the EALA.

(j) The 1st Respondent contended that the said EALA elections were conducted by secret ballot and in conformity with Articles 23(1),27(2),38(1) and 50(1) of the Treaty.

(k) In the alternative, but without prejudice to the foregoing, the 1st Respondent averred that non conformity with any procedural Rules

was not fatal or substantial to the adoption/passing of the said Rules or conduct of the said elections.

On the basis of the foregoing, the 1st Respondent prays that the Reference be dismissed with costs.

Case for the 2nd Respondent

The 2nd Respondent filed his Response on August 13, 2012 and his submissions on April 8, 2013 and his case is as follows:-

(a) That the matters contained in the Applicant's case are, pursuant to Article 52 of the Treaty, tantamount to questions of an election of representatives of a Partner State to the EALA, which must be determined by an institution of the Republic of Uganda that determines questions of the elections of members of the National Assembly.

(b) That the Reference does not allege any wrong doing on his part and therefore there is no cause of action against him and that the Reference is wrongly and unprocedurally filed against him.

(c) That the recognition of elected Members of the EALA is a function of the law under the Treaty and the Rules of Procedure for Election of Members of the EALA and does not rest with him at all.

(d) That on the basis of that law, the 2nd Respondent is bound to take cognizance of the election of Members of EALA as duly communicated to him and he could not in the circumstances, have halted the swearing in of members of the EALA.

It is also the 2nd Respondent's case that the granting of orders sought would unduly interfere with the smooth operations of the East African Community and he prays that the Reference be dismissed with costs.

The Interveners' Case

The Interveners' case, briefly, is as follows:

(a) That the process of enacting the Rules of procedure for the election of the representatives of Uganda to the EALA followed the established legal mandate of the Parliament of Uganda and the adopted procedure, particularly Rule 13(1) and (2) of Appendix B was consistent with and not in contravention of the provisions of Article 50(1) of the Treaty.

(b) That the impugned 2012 Rules comply with Article 50 of the Treaty as they cater for all the categories of persons required and provided for by the procedure of election of the EALA representatives and the Interveners were properly elected out the process.

(c) That the Rules allowed all the various political parties represented in Parliament to nominate any number of candidates to participate in the EALA elections.

(d) That the Rules no longer use the phrases **"numerical strength"** as they previously did.

(e) That the Interveners represent all the categories stipulated in Article 50 of the Treaty, namely, the various political parties represented in the Parliament of Uganda, shades of opinion, gender and other special interest groups.

SCHEDULING CONFERENCE

Pursuant to Rule 53 of the Rules of this Court, a Scheduling Conference was held on February 6, 2013 at which the following were framed as the points of agreement and disagreement respectively:

(i) **Points of agreement**:

(a) The Parliament of Uganda passed Rules of Procedure for the election of Members of the East African Legislative Assembly on the 18th May 2012.

(b) The Reference raises triable issues meriting adjudication and pronouncement by this Court.

(ii) **Points of disagreement/issues for determination of court**

1. Whether the Court is vested with jurisdiction to entertain issues relating to the election of members to the EALA.
2. Whether the Applicant has ***locus standi*** to institute this Reference.
3. Whether the amended Reference is in conformity with the Rules of Procedure of this Honourable Court.
4. Whether the Parliament of Uganda exercised its power of election under Article 50(1) of the Treaty.
5. Whether the meaning and import of Article 50 (1) of the Treaty requires that all the six political parties be represented in the EALA.
6. Whether the 2nd Respondent is legally bound to halt the swearing of the elected members of the EALA.
7. Whether the parties are entitled to the remedies sought.

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.

All the Parties noted that there was no possibility of mediation, conciliation or settlement.

Counsels' Submissions and Determination of the Issues

Issue No. 1:

Whether the Court is vested with the jurisdiction to entertain issues relating to the election of the members of EALA

From the outset, Mr. Rwakafuuzi, prayed that this issue should be rephrased to reflect the Applicant's pleadings and to read as follows:

> "Whether the Court is vested with jurisdiction to entertain this Reference**."**

It is his argument that the 1st Respondent had refused to do what the Speaker of Parliament in Uganda had asked him to do, that is, refer the issue to this Court for interpretation. That the Applicant in this Reference is now seeking the Court's interpretation of the meaning of 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 it is feasible, the various political parties represented in the National Assembly…"***

It is Counsel's contention that building on the foregoing, the proper issue to be answered is whether this Court has jurisdiction to entertain the Reference that seeks the interpretation by the Court as to whether all the political parties represented in the Parliament of Uganda should be guaranteed representation in the EALA by the Rules of Procedure for Election of Members to the EALA.

Mr. Rwakafuuzi argued that in **Professor Peter Anyang' Nyong'o & Others vs The Attorney General of Kenya – EACJ Reference No. 1 of 2006,** this Court held that the Court had the power to interpret whether the rules made for the election of members to the EALA were in conformity with the Treaty. It is his stance that the instant Reference seeks an answer to that same question.

Counsel contended further that the present Reference is distinguishable from that of Christopher **Mtikila vs Secretary General of the East African Community and Others – EACJ Ref. No. 2 of 2007,** which sought merely to challenge elections of members of EALA by the Tanzanian Parliament.

It is on the basis of the foregoing that the Learned Counsel invited this Court to answer the issue in the affirmative.

Ms. Robinah Rwakoojo, disagreed for the following reasons:

(a) This Court's jurisdiction is confined, under Article 27 (1), to interpretation and application of the Treaty and excludes specific matters which are a preserve of the Institutions of National Partner States.

(b) In the instant Reference, the Applicant, as is clear from his prayers, namely, paragraphs (b), (c), (f) and (g), is inviting this

Court to enquire into and make declarations on the validity of the election of all the nine elected Representatives of Uganda to the EALA (the 9 Interveners).

It is Counsel's argument that any question regarding the validity of any members' election to the EALA, was explicitly the **sole preserve** of the institutions of the Partner State that determine questions of election of members of the National Assembly responsible for the election in question as provided by Article 52(1) of the Treaty.

It is Counsel's stance, that on the basis of the foregoing, the Applicant is improperly before this Court. In support of her proposition the Counsel relied on the provisions of Article 52 of the Treaty and also on the decisions and pronouncements in the following cases: **EACJ Ref. No. 2 of 2007 Christopher Mtikila vs. The Attorney General of the United Republic of Tanzania and Another, and EACJ Ref. No 1 of 2010 Hon. Sitenda Sebalu vs. Secretary General of the East African Community and 3 Others.**

In the premise, the Counsel urged us to answer Issue No. 1 in the negative.

Mr. Kaahwa, in essence, associated himself with the submissions of his colleague representing the 1st Respondent.

He was, however, emphatic that what is before us is not a Reference within the normal parameters of Articles 27 and 30 of the Treaty. He contended that what is before this Court is actually a petition in disguise, which should have been handled in accordance with the provisions of Article 52 of the Treaty which provides that: -

"***1. Any question that may arise whether any person is an elected member of the Assembly or whether any seat on the Assembly is vacant shall be determined by the institution of the Partner State that determines questions of the election of numbers of the National Assembly responsible for the election in question.***

2. The National Assembly of the Partner States shall notify the Speaker of the Assembly of every determination made under paragraph 1 of this Article."

On the basis of the aforementioned, Mr. Kaahwa submitted that in effect, in cases where the matters allegedly fall within the ambit of Article 52, as it is the case in the instant matter, then this Court ought to divest itself of jurisdiction as it did the **Mtikila** case (supra).

It is the Counsel's further argument that in light of the aforesaid, the proper course of action for the Applicant would therefore, have been to petition the High Court of Uganda under Article 86(1), (2) and (3) of the Constitution of the Republic of Uganda as amended and Section 86 of the Parliamentary Elections Act, 2005 for that court to make a finding on the question of membership to the EALA, raised in the instant Reference.

It was Mr. Kaahwa's prayer, therefore, that as this Court is not vested with the jurisdiction to entertain issues relating to the election of Members to the EALA, issue No. 1 should be answered in the negative.

Mr. Semuyaba on his part, associated himself with the submissions of Counsel for the 1st and 2nd Respondents, and we do not find it necessary to regurgitate those submissions.

Mr. Semuyaba, however, urged this Court to take note of the fact that after the decision in the **Prof. Anyang' Nyongo's case** (supra) , Article 27 of the Treaty was amended. The said amendment in August 2007 introduced a proviso which reads:-

> ***"Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of such interpretation to jurisdiction conferred by the Treaty on organs of Partner States."***

It is Mr. Semuyaba's argument in that regard that the import of this proviso is that, after 2007, this Court cannot go into matters of interpretation reserved for the institutions of the Partner States.

He further contended that whoever is dissatisfied with the result of an election to the EALA, ought to move under Article 52 of the Treaty, therefore, this Court cannot entertain the instant Reference which aims at nullifying the elections to the EALA as it has no such jurisdiction under Article 52 of the Treaty.

Decision of the Court on Issue No. 1

From the outset, we find it pertinent to point out that the Applicant's Counsel who is now requesting the Court to rephrase this issue had fully participated in the Scheduling Conference where both parties ascertained the points of agreement and the issues for determination by the Court, after which the Court had directed the parties to correct clerical mistakes, sign and file a joint Scheduling Memorandum. That directive was complied with by all the parties.

It is common knowledge that the rationale for scheduling is to agree and narrow down the issues for resolution by the Court. This is provided for under the Rule 53 of the Court's Rules. For that reason, and in fact in the absence of good cause, the Applicant cannot be heard to say that during the Scheduling Conference, the issue thus framed did not arise from his pleadings.

We accordingly, with great respect to Mr. Rwakafuuzi's, decline his invitation and elect to proceed with the issue in question as framed, agreed and signed on September 12, 2013 when we sat for the Scheduling Conference.

Having therefore considered the rival arguments of the parties in support of their respective positions on this issue , we opine as hereunder:

Firstly, that this Court derives its jurisdiction from the Treaty, which prescribes the role of the Court under Article 23 (1) as, follows:

> ***"(1) The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty."***

Further, a closely related but distinct provision is Article 27 (1) of the Treaty, which states as follows regarding the jurisdiction of the Court:

> ***"1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:***
>
> ***Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such***

interpretation to jurisdiction conferred by the Treaty on organs of Partner States".

The Treaty, and of importance to the present Reference, also provides in Article 30 (1) and (3) that:

" (1) 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 ground that such Act, regulation, directive or action is unlawful or is an infringement of the provisions of this Treaty.

(2) *…*

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

It is amply clear from the pleadings and the prayers sought, that in the instant case, unlike the **Mtikila's case** (supra), annulment of the election to the EALA is not the substratum of the Reference. The Applicant is seeking orders and reliefs, which, in essence, are pegged on the interpretation and application of Article 50(1) of the Treaty, which is proper and within the mandate of the Court under Article 27(1) of the Treaty.

On this score alone, we find and hold that the instant Reference, as rightly submitted by Mr. Rwakafuuzi, is distinguishable from the **Mtikila case** (supra).

Secondly, we are also alive to the fact that the Applicant's original Reference was filed on May 28, 2012, namely, two days before the election of the Members to the EALA in Uganda. This being the state of affairs, by any stretch of imagination, the Applicant's Reference cannot be said to be about the elections as stipulated in Article 52 of the Treaty.

On that score, we are again in agreement with Counsel for the Applicant that the gravamen of his complaint was in respect of the Rules enacted prior to May 30, 2012 and not the result of the election per se.

However, we are unable to close our eyes to the fact that in the Amended Reference lodged on June 22, 2012 ,there are prayers sought which do not fall within the ambit of Article 50(1) of the Treaty. It is our candid view in that regard that those pleadings and the declarations sought fall squarely within the ambit of Article 30 of the Treaty. Hence the abandonment of prayers (b), (c) and (e) of the Reference by the Applicant.

We are fortified in this view by the decision of our predecessors in **Prof. Peter Anyang' Nyongo's** (supra) where this Court found that some declarations sought fell within the ambit of Article 52 (1) of the Treaty and refused to entertain that aspect of the issue but dealt with the aspect of the case that fell squarely within the ambit of Article 50(1) of the Treaty and gave the declarations accordingly.

Thirdly, we find and hold that the instant Reference when properly examined, specifically prayers (a), (d), (f) and (g), raise issues for interpretation under Articles 27(1) and 50(1) of the Treaty.

For the reasons we have given, our answer to issue No.1 is that the Court has jurisdiction relating to election of the EALA members only where it requires interpretation of the Treaty.

Issue No. 2:

Whether the Applicant has locus standi to institute this Reference.

Submissions:

It has been submitted by Mr. Rwakafuuzi as follows:-

(a) That the Applicant is the Shadow Attorney General for the Opposition in the Parliament of Uganda. Therefore, he has locus under Article 30 (1) of the Treaty to access this Court. In that regard, he is seeking the interpretation of the Treaty in relation to the dispute that has arisen in Parliament as to the proper interpretation of the Treaty in the making rules for the election of the members to the EALA.

(b) In **Plaxeda Rugumba vs. The Attorney General of Rwanda – EACJ Ref. No. 8 of 2010** the same issue arose and this Court held that any resident in the East African Community has access to this Court by virtue of Article 30 (1) of the Treaty to seek the Court's interpretation of the Treaty when a dispute has arisen.

In the premise, Counsel prayed that this issue be answered in the affirmative.

Counsel for the 1st Respondent declined to make any submissions on this issue.

Although Mr. Kaahwa, made elaborate submissions, in the end, he did not contest the issue.

Mr. Semuyaba, in his submissions went more into the merits of the case, and not *locus standi*. Nothing substantive thereof came out of his submission on this issue. His argument was that there is all evidence that the Applicant as a Member of the Parliament and Shadow Attorney General for the Opposition participated in the making of the Rules in 2012. The Counsel submitted further that the Applicant being a Member of Parliament is not eligible for election.

He concluded by saying that in the light of the foregoing, the Applicant's Reference is, therefore, superfluous.

Decision of the Court on Issue No. 2

This issue was a non-issue and therefore we are in full agreement with Counsel for the Applicant that the Applicant has *locus standi* to bring this Reference under Article 30 of the Treaty.

Accordingly, we answer Issue No. 2 in the affirmative.

Issue No. 3

Whether the Amended Reference is in conformity with the Rules of Procedure of this Honourable Court.

Counsel for the 1st Respondent had the following to say on this issue:

That on May 28, 2012, the Applicant filed this Reference against the 1st Respondent only. On June 22, 2012, the Applicant filed an Amended

Reference in which, among others, he added the Secretary General of the East African Community as the 2nd Respondent.

It is the Counsel's submission that, in filing the Amended Reference, the Applicant did not comply with Rule 48 (b) of the Rules, in that he did not seek the requisite consent from the party to be added as required by that Rule. The Rule requires:

"…the consent of all parties, and where a person is to be added or substituted as a party, that person's consent."

The Counsel concluded by saying that the failure to seek the consent of the other parties is a procedural illegality to which the Court cannot close its eye.

Mr. Kaahwa went even further in his submission on this issue and had the following to say:

Firstly, that the Amended Reference does not state under what rules the Amended Reference was lodged. It merely states "r 24(1)" without any particular set of Rules. The only law being referred to is the Treaty, which equally does not have any rules or regulations attached thereto.

Counsel further submitted that even if he is to assume that Rule 24(1) of the Rules of this Court is being referred to by the Applicant, it is his contention that it does not apply to the lodging of the Amended Reference. Rule 24(1) of the said Rules provides that:

"A reference by a Partner State, the Secretary General or any other person under Articles 28, 29 and 30 respectively shall be instituted by presenting to the Court an application."

Counsel further argued that according to Rule 12(1) of the Rules:

"a party entitled or given leave to amend a pleading may amend the original document itself or lodge an amended version of the document."

Rule 12 (2) provides that such amendment may be by striking through the words or " **figures to be deleted in red while they remain legible and/or writing the words or figures to be added in red".**

Counsel, invited us to note that in this Reference, the amendments are merely highlighted in pink and the words added are not in red as required by the above Rule.

It is the Counsel's argument that what the Applicant did, is tantamount to a procedural anomaly and that courts of law do not accede to such procedural anomalies and mishaps.

Secondly, it is Counsel's submission that the manner in which the 2nd Respondent was added to this Reference by way of Amended Reference was irregular and incredibly out of consonance with the Rules. It is Mr. Kaahwa's contention, that the Applicant was obliged under Rule 48(b) of the Rules to seek the prior consent of the 2nd Respondent. The said rule provides that:

"**(*48) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in the pleading, a party may amend its pleading:***

(a) without leave of the Court, before the close of pleadings;

(b) with the consent of all parties, and where a person is to be added or substituted as a party, that person's consent; or

(c) with leave of the Court." (Underlining is provided for emphasis).

It is Counsel's submission that it is glaringly clear that in the instant matter the Applicant did not comply with the Rule in question. In conclusion, Mr. Kaahwa, urged this Court to ***suo motu*** resolve in his favour and dismiss the Reference with costs on this score alone.

Mr. Semuyaba, associated himself with the arguments of Counsel for 1st and 2nd Respondents , specifically on the requirements of Rule 48 (b) of the Rules. Further to the foregoing, he invited this Court to follow the footprints of the courts in the following cases, namely, **Nambi v Bunyoro General Merchants (1979) HCB, African Overseas Trading Co. vs Achorya** (1963) EA 468, **Hogod Jack Simonian v Johar (1962) E.A 336 and Fernandes Kara Arjan & Sons** 1961 E.A.693, where those courts upon being faced with a similar situation struck out the pleadings. He. also prayed that the amended pleadings be struck out with costs.

Mr Rwakafuuzi was very brief on this issue. He submitted that the issue was raised by Counsel for the 1st Respondent, yet the amendment did not affect the validity of the pleadings raised against the 1st Respondent. That as the amendment did not affect the validity of the pleadings raised against the 1st respondent, his complaint is baseless, to say the least. That as the Secretary General did not complain that he had been joined in the Reference without leave of Court or his consent, therefore, the Applicant deserves to be granted the declarations sought in the Reference excepting prayer "c" thereof.

Decision of the Court on Issue No. 3

This issue rotates around the applicability of Rule 48(b) of the Rules which is reproduced elsewhere above, therefore we shall not spend time on it because it is obvious that the Rule was violated by the Applicant ,who has in any event, not denied such violation. In that event, we agree with the submissions by Counsel for the Respondents and the Interveners and following the authorities set out above, the only option available to the Court, is to strike out the Reference against the 2nd Respondent who was wrongly enjoined to the proceedings.

The answer to the issue is thus in the negative.

Issue No. 4

Whether the Parliament of Uganda exercised its power of election under Article 50 (1) of the Treaty.

Mr. Rwakafuuzi forcefully argued that there were no valid elections envisaged under Article 50 (1) of the Treaty because:

Firstly, there were no valid rules to guide the election. It is his argument that the impugned Rules do not live to the expectation of Article 50 (1) of the Treaty as they do not do the following:

(a) they do not spell out that all the six political parties represented in Parliament shall be represented in the EALA.
(b) they do not go on specify what the political parties represented in Parliament are although the Rules talk of "***the various political parties and organizations represented in Parliament"*** (see Rule 13 (1) of the impugned Rules.)

(c) they do not say whether all parties or which of them will be represented in Parliament, and the standard of qualification of any such party to have a member or members selected for the EALA.

(d) they do not elaborate what they actually mean by "shades of opinion". It is Counsel's contention that "shade" of opinion should have been mentioned in the Rules, so that the "shade" of opinion is either agreed unanimously or arrived at by majority vote. In other words, the "shades'' of opinion must be mentioned specifically in the Rules.

(e) though the Rules go on to include "gender", they do not say how the 'gender' shall feature.

(f) though the Rules talk of "…**and other special groups**…", they do not say what **special interested groups** were to be represented, how they were to be identified or how were they to be nominated.

(g) they did not spell out how the independent candidates would be identified.

It is, therefore, his main argument that what were called "Rules" could not guide the conduct of Parliament in the purported elections of the EALA. It is his contention that the said Rules were not merely permissive but were so vague and allowed whimsical and arbitrary conduct, not envisaged under Article 50 of the Treaty.

Secondly, that the Parliament of Uganda did not exercise the power of election bestowed upon it under Article 50(1) of the Treaty and that since there were no Rules to guide Parliament with regard to each political party's stake, it can only be concluded that the NRM political party

assumed the role of Parliament and purported to elect the six nominees who were then wholesale approved by Parliament without election.

It is Counsel's argument that the Parliament had divested itself of its obligation under Article 50(1) of the Treaty and bestowed it on the political parties, in particular the NRM political party that assumed the role of Parliament. According to the Counsel, this scenario is the same as in the **Hon. Oulanyah** case(supra).

Thirdly, Mr. Rwakafuuzi decried the non-gazettement of the Rules. He contended that lack of gazettement continues to show that the Rules were not meant to guide objective conduct of the members in electing members of the EALA. Since the persons to be elected were outside Parliament, it was necessary to give qualified persons notice in the gazette of the existence of those Rules.

Based on the foregoing, Counsel prayed that this issue be answered in the negative.

Counsel for the 1st Respondent in answering this issue submitted as follows:

Firstly, that the impugned Rules were enacted on May 18, 2012 whereupon, and it is amply evident from the copies of the Official Hansard Report for May 18, 2012 at page 114 paragraph 10 to 129, that all political parties represented in Parliament were involved in the process.

Secondly, Counsel argued that Rule 13(1) which specifically deals with the election procedure mirrors the wording of Article 50(1) of the Treaty as it now reads as follows:

"(1) The election of members to the Assembly representing the various political parties and organizations represented in Parliament, shades of opinion, gender and other special interest groups in Uganda shall be conducted after consultation and consensus by the political parties and other members of Parliament."

It is the Counsel's argument that the Rules allow for open nominations and open up the election process without limitation to the number of nominees from the political parties represented in the Parliament of Uganda and independent candidates. That they also cater for gender, shades of opinion and other special interest groups in total compliance with Article 50 of the Treaty.

Thirdly, Counsel submitted that, on May 30, 2012, the seventeen duly nominated and vetted candidates openly campaigned in Parliament and nine of them were subsequently elected in a free and fair election, as Uganda's representatives to the EALA.

It is Counsel's contention that what transpired on May 30, 2012 for all intents and purposes was an election to choose or select through a process of voting as was determined by the National Assembly of the Republic of Uganda, in total compliance with Article 50(1) of the Treaty.

Fourthly, Counsel asserted that the elected nine members were from outside the Parliament of Uganda's in compliance with Article 50(1) of the Treaty.

It is based on the foregoing that the learned Counsel invites this Court to answer Issue 4 in the affirmative.

Mr. Kaahwa, did not submit on this issue.

Mr. Semuyaba learned Counsel for the Interveners, made very lengthy submissions while answering this Issue. We will, however, give a summary of his submission, which is as follows:-

Firstly, that the election of the Members to the EALA, which is now a subject matter in this Reference, was undertaken by the Parliament of Uganda as provided for by the Election Rules within the meaning of Article 50 of the Treaty.

Secondly, that although Article 50 of the Treaty provides for the National Assembly of each Partner State to elect nine members, it gives no directions on how the election is to be done, except for the stipulations that the nine must not be elected from members of the National Assembly and that as far as possible, they should represent specified groupings.

It is the Counsel's contention that it is expressly left to the National Assembly of each Partner State to determine its procedure for the election. According to the Counsel, this is in recognition of the fact that each Partner State has its peculiar circumstances to take into account in doing so.

Thirdly, He argued that the power and discretion of the National Assembly under Article 50(1) is so unfettered that the National Assembly may determine the procedure of election in exercise of that power and discretion. Counsel contended further, that the aforegoing was approved by this Court in the **Prof. Anyang' Nyongo** (supra).

Fourthly, he asserted that Article 50 of the Treaty constitutes the National Assembly of each Partner State into **"an Electoral College"** for electing the Partner States' nine representatives to the Assembly.

Fifthly, he argued that the Hansard of the Parliament of Uganda shows that a nomination process was conducted and an election was conducted as is required by Article 50 of the Treaty.

It is the Counsel's contention that if the Court undertakes the task of giving dictionary meaning to the expressions "**to elect"** and "**an election**", it will be assuming the role of making rules of procedure, which is the preserve of the National Assembly. Counsel was, however, of the view that in the context of Article 50, the words "**election**" and "**to elect**" relate to the National Assembly choosing or selecting persons to hold political positions and that it has been left to each National Assembly to adopt its preferred meaning of the words through the rules of procedure it determines. (See **Prof. Peter Anyang' Nyongo's** case supra).

In conclusion, the 1st Respondent and the Interveners pray that this issue be answered in the affirmative.

Decision of the Court on Issue No. 4

We have considered the submissions of all the learned Counsel and taken into consideration the pleadings and evidence on record.

It is not in dispute that following a lengthy debate, the Parliament of Uganda, on May 18, 2012 passed the Rules of Procedure for the election of the Members to the EALA.

We are also in agreement with the learned Counsel for the 1st Respondent that Rule 13 which specifically deals with the election procedure "mirrors" the wording of Article 50 of the Treaty.

It is palpably clear to us, and we have no doubt in our minds, that the impugned Rule 13 (1) of the Appendix B spelt out vividly the procedure for election of Uganda's Representatives to the EALA. The said Rule has been reproduced elsewhere in this judgment.

From the above, it is abundantly clear that the Rule spelt out that the various political parties represented in Parliament, shades of opinion, gender and other special interest groups, who wished to contest for the EALA, were free to do so.

The process and procedure for nomination, campaigns and subsequent election, in any event, guaranteed the participation of any interested person and we have seen no evidence to the contrary.

In the instant Reference, the Applicant wants this Court to determine whether the Parliament of Uganda exercised its power of election under Article 50(1) of the Treaty and in doing so, we shall walk in the footprints of our predecessors in the now famous case of **Prof. Anyang' Nyongo'** (supra) and opine as follows:

One, that in the Prof**. Anyang Nyongo's c**ase, the claimant maintained that the expression "**shall elect**" as used in Article 50 can only mean **"shall choose by vote**". That is the ordinary meaning as defined in several dictionaries, and as it is understood and practiced in all the Partner States,

and also in international democratic practice worldwide. Under the constitutional and electoral laws of Kenya that govern the elections of the President, and of Speaker, Deputy Speaker and Members of Parliament, the Court at pg. 31 of the **Prof. Anyang Nyongo's** case, held as follows:

> ***"It is common ground that the ordinary meanings of the words "election" and "to elect" are "choice" and "to choose" respectively; and that in the context of Article 50, the word relates to the National Assembly choosing or selecting persons to hold political positions."***

We agree with the above and we therefore find and hold that the definition of election as discussed above, equally applies to this Reference.

Two, that while Article 50 provides for the National Assembly of each Partner State to elect nine members of the EALA, it gives no directions on how the election is to be done, except for the stipulation that the nine must not be elected from members of the National Assembly and as far as feasible, they should represent specified groupings. Instead, it is expressly left to the National Assembly of each Partner State to determine its procedure for the election and as was held at page 29 to 30 of the **Prof. Anyang Nyongo's c**ase:

> ***" while the Article provides that the nine elected members shall as much as feasible be representative of the specified groupings, by implication it appears that the extent of feasibility of such representation is left to be determined in the discretion of the National Assembly. Secondly, the National Assembly has***

the discretion to determine the procedure it has to follow in carrying out the election.".

This is in recognition of the fact that each Partner State has its peculiar circumstance to take into account. Here, we take judicial notice of the fact that the number of political parties in the Partner States differ from one State to another. In some of them there are more than a dozen political parties, namely, Kenya and Tanzania. In our view, this explains why the framers of the Treaty in their wisdom, for the purposes of uniformity for all the Partner States used the word **'various'** to allow for the diversity in their circumstances.

Three, that on May 30, 2012, the seventeen duly nominated and vetted candidates openly campaigned in Parliament and nine of them were subsequently elected as Uganda's members to the EALA (see Annex 'H' to the affidavit of Mrs. Jane Kibirige on pages 397 – 431 of the 1st Respondent's reply to the Reference).

On that basis, we find it difficult to resist the conclusion that what transpired on that day when the Parliament of Uganda constituted itself into an "E**lectoral College**", was an election within both the dictionary meaning (see Black' s Law Dictionary) and in the context of both Article 50 of the Treaty and **Prof. Anyang Nyongo's case. (**supra)

It is for the above reasons that we must answer Issue No. 4 in the affirmative.

Issue No. 5

Whether the meaning and import of Article 50 (1) of the Treaty requires that all the six political parties represented in the Parliament of Uganda, shades of opinion, gender and other special interest groups be represented in EALA.

Mr. Rwakafuuzi, in answer to the issue contended that Issue 5 as framed in the joint conferencing memo arises from the pleadings.He thus rephrased it to read as follows:

"Issue No. 5: Whether the meaning and import of Article 50 (1) of the Treaty requires that all the six political parties represented in the Parliament of Uganda, should be represented in EALA."

It is the Applicant's case that since Uganda has only six political parties in Parliament, it was feasible for all of them to be represented in the EALA in fulfillment of the requirement of Article 50 (1) of the Treaty. It is the learned Counsel's argument that the Treaty envisaged some concept of proportional representation, in contradiction to ***"winner takes it all".*** He argued further that the framers of the Treaty in their wisdom knew that there will always be a ruling party in Parliament with the majority and if the framers of the Treaty had wanted that only the majority in Parliament would elect Representatives to the EALA, the Treaty would have said so. It is his argument therefore, that the Treaty does not talk of numerical strength as the basis of representation and asserts further that the Treaty provides that parties in Parliament be represented irrespective of their numerical strength.

it is Mr. Rwakafuuzi's main argument that the Rules of Procedure for the election of members of EALA in Uganda, are inconsistent with the Treaty.

Learned Counsel contended further that the Court in **Hon.Jacob Oulanyah's case** (supra) impeached the Rules of Procedure for the election of members to the EALA for providing numerical strength as a basis for election to the EALA. That the Court reasoned that the precept of numerical strength tended to exclude independents who should be allowed to participate in any electoral exercise.

Further to the foregoing, Learned Counsel had the following to say in respect of the impugned Rules:

(a) That this Court should examine the impugned Rules and find whether they contravene Article 50(1) of the Treaty.

(b) That the impugned Rules were not capable of guiding any conduct in the election of the EALA members. By way of illustration, Counsel cited the following:

(i) The Rules talk of ***"political parties represented …in Parliament***", but they do not go on to tell what are the political parties represented in Parliament and what is to be expected in relation to the proposed elections by the Parliament. Counsel submitted further that the said Rules do not say whether all parties or which of them will be represented in Parliament, and the standard of qualification of any such party to have a member or members elected for the EALA.

(ii) The Rules talk of "shades of opinion", but they do not go on to tell what shades of opinion.It is the Counsel's stance that the "shade"

must be mentioned in the Rules so that the shade is either agreed unanimously or arrived at by majority rule.

(iii) The Rules talk of ***'gender'*** but they do not say how gender shall feature.

(iv) The Rules go on to mention "…***and other special interest groups …"*** but they do not specify what special interest groups were to be represented, how were they to be identified and how would they be nominated.

In conclusion, Counsel submitted that the said Rules were not merely permissive but were vague and allowed whimsical and arbitrary conduct, not envisaged under Article 50 of the Treaty. He argued further that there was no gazettement of the impugned Rules.

Counsel asserts in that regard that lack of gazettement continue to show that the Rules were not meant to guide objective conduct of the members in electing Members to the EALA. That since the persons to be elected were outside Parliament, it was necessary to give such persons notice of the gazettement of the existence of those Rules.

In reply, Counsel for the 1st Respondent contended that as the Counsel for the Applicant had fully participated in the Scheduling Conference in the framing of the issues, it is just unfair for the Applicant's Counsel to purport to amend Issue No. 5 of the basis that it does not flow from his pleadings. Counsel thus proceeded to answer the instant issue as framed and agreed by the Parties on the material day.

It is the learned Counsel's submission in the main therefore, is that the meaning of Article 50(1) of the Treaty has already been set out in **Reference No. 6 of 2011 – Democratic Party and Mukasa Mbidde vs The Secretary General of the East African Community & Another** and therefore, does not need further adjudication. But for ease of reference and clarity we hereby reproduce what this Court stated at pg. 15 of that judgment:

> ***"the essential requirement for EALA elections provided for in Article 50(1) of the Treaty are:***
>
> - ***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;***
>
> ***(d) other social interest group;***
>
> ***the procedure for elections shall be determined by the National Assembly".***

From the foregoing, it is the Counsel's contention, that there is nothing that requires this Court to interpret whether the rules of procedure adopted by the National Assembly of Uganda conform to Article 50(1). He contended further that for this Court to assign a meaning or attempt to assign a meaning to Article 50(1) of the Treaty as framed in Issue 5 would amount to

usurping the power conferred to the National Assembly of Uganda to make Rules of Procedure as provided under Article 50(1) of the Treaty.

For the above reasons, Counsel urged this Court to answer the issue as framed in the negative.

In his submissions, Counsel for the 1st Respondent contended that Rule 13(1) of the Rules of Procedure for the Election of Members to the EALA spelt out clearly that all the political groups/organizations who wished to contest for the EALA were free to do so. It specifically included all the political parties and organizations represented in Parliament, shades of opinion, gender and other special interest groups represented in the Parliament of Uganda. That the process and procedure for nomination, campaigns and subsequent elections guaranteed the participation of any interested person.

He further contended that guaranteeing slots as advocated for by the Applicant would have in essence fettered the power of Parliament to "elect" members to EALA and, therefore, risked being in contravention of Article 50(1) of the Treaty. Counsel further argued that had the Rules of Procedure allocated or guaranteed six slots to the six political parties that are represented in the Parliament of Uganda that would amount to the exclusion of the other groups mentioned in Article 50(1) of the Treaty and the purpose of an election would be defeated.

According to Counsel, it is now clear that each National Assembly of a Partner State has the power to "***elect"***, and that it is a central requirement towards compliance with the provisions of Article 50(1) of the Treaty. That any Rules of Procedure that deprive a National Assembly of the Partner

State of the mandate of electing a member to the EALA would be in violation of the Treaty.

Counsel concluded by submitting that, in light of the foregoing, it is obvious that the meaning and import of Article 50(1) of the Treaty would not require that all six political parties represented in the Parliament of Uganda should be represented in the EALA.

Learned Counsel for the Interveners forcefully opposed the Applicant's stance and contended that the Parliament of Uganda passed the new Rules after the **Mbidde Case** (supra) whereby this Court categorically stated that the National Assemblies of the Partner States shall have the **exclusive** role of making their own Rules of Procedure for the elections.

That the Parliament of Uganda in its wisdom made the 2012 Rules in conformity with Article 50 of the Treaty and that the said Rules did not exclude any political party or any category of persons.

According to Counsel, the 2012 Rules no longer embodied the phrase ***"numerical strength***" as is alleged by Hon. Ken Lukyamuzi in his affidavit.

Counsel drew the Court's attention to the copies of the Hansard Reports on record, which amply shows that there was nomination of the candidates, that those nominees were given opportunity to campaign and that the voting process on the election day was by secret ballot. Subsequently, there was the counting of votes and finally the announcement of results.

Lastly, Counsel submitted that those elected to the EALA represent the various political parties represented in the Parliament of Uganda, shades of

opinion, gender and other special interest groups as stipulated in Article 50(2) of the Treaty. He prayed that this issue be answered in the negative.

Decision of the Court on Issue No. 5

From the outset, we must note that we have already addressed the issue of rephrasing of issues earlier on in this judgment. We reiterate our decision on this point, and we need not belabour the point.

On the issue at hand, it is apparent from the Applicant's pleadings and the submissions, that the Applicant's main complaint is that the new Rules of Procedure are not in conformity with Article 50 of the Treaty, basically on the ground that the Rules did not guarantee a slot in the EALA for each political party represented in the Parliament of Uganda.

With due respect to the Counsel for the Applicant, we are not persuaded by his argument. It is agreed that there are six political parties in the Parliament of Uganda and that each had a chance to nominate candidates to stand for election on the Election Day for members to the EALA.

Further, that the very nature of any election would necessitate that no candidate is assured of election merely because he is supported by a particular political party.

We are also firmly of the view that as rightly argued by the Counsel for the parties opposing the Reference, that the impugned Rules for the election of Members to the EALA that were passed following this Court's order in the **Mbidde case** (supra) conformed to Article 50(1) of the Treaty. Further to that, we are also satisfied that the Rules were made by following a proper interpretation of Article 50 as laid down in **Prof. Anyang' Nyongo'**

case (supra) and the **Jacob Oulanyah case** (supra). We need not go further than this on this point, as we have already done so, while considering and determining Issue No. 4.

For the above reasons, we conclude by saying that the meaning and import of Article 50 (1) of the Treaty does not require that all the six political parties represented in the Parliament of Uganda should be represented in the EALA.

We accordingly answer Issue No. 4 in the negative.

ISSUE NO 6: The Applicant abandoned this issue.

Issue No. 7

Whether the parties are entitled to the remedies sought

In light of our findings and conclusions on the issues herein:

1.Prayers (a), (d), (g) and (h) are disallowed.

2.As prayers (b), (c) and (e) were abandoned during the hearing the Court makes no order in respect of the said prayers.

3. Having regard to the fact that the instant Reference falls in the category of public interest litigation, each party shall bear his or its costs.

CONCLUSION

In conclusion, the Reference stands dismissed. Each party shall bear his/its costs.

It is so ordered.

Dated and delivered at Arusha this 25th day of November 2013.

……

Jean Bosco Butasi

Principal Judge

……..

M. S. Arach-Amoko

Deputy Principal Judge

……

John Joseph Mkwawa

Judge

……

Isaac Lenaola

Judge

……...

Faustin Ntezilyayo

Judge