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

(Coram: Jean-Bosco Butasi, PJ, Isaac Lenaola, DPJ, Faustin Ntezilyayo, J)

REFERENCE NO. 7 OF 2012

ANTONY CALIST KOMU..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE UNITED REPUBLIC OF TANZANIA.....RESPONDENT

26th SEPTEMBER, 2014

JUDGEMENT

A. INTRODUCTION

1. The Applicant, Antony Calist Komu (hereinafter **"the Applicant"**) is a member of Chama Cha Demokrasia na Maendeleo (CHADEMA), a political party in the United Republic of Tanzania (hereinafter **"Tanzania"**), a Partner State within the East African Community (hereinafter the **"EAC**"). In that capacity, he had sought election as a representative of Tanzania to the East African Legislative Assembly (hereinafter **"EALA**") in an election conducted in the National Assembly of Tanzania on 17th April, 2012. He was unsuccessful in his bid and on 15th June, 2012, he filed the present Reference to challenge the said election on grounds *inter alia,* that in conducting the said election, the National Assembly of Tanzania violated Article 50 of the Treaty for the Establishment of the East African Community (hereinafter **"the Treaty"**).

2. The Reference is premised on the provisions of Articles 6(d), 7, 8, 23, 27, 30, 33 and 50 of the Treaty, Rules 1(2) and 24 of this Court's Rules of Procedure as well as the Vienna Convention on the Law of Treaties.

3. It is supported by the Hansard Report of the Parliament of Tanzania for 17th April, 2012, the Witness Statement dated 3rd October, 2013 and oral evidence of the Applicant, the Witness Statement dated 4th October, 2013 and oral evidence of John Mnyika, a counter Affidavit sworn on 22nd November, 2013 by the Applicant and Affidavits sworn on 4th October, 2013 and on 19th November, 2013 by Edson Mbogoro, Learned Counsel for the

Applicant. A reply to the Response by the Respondent was also filed on 17th March, 2013.

4. The Respondent is the Attorney General of Tanzania and in opposition to the Reference, he filed a Notice of Preliminary Objection dated 26th February, 2013, accompanied by his substantive response to the Reference. On 1st November, 2013, he filed an Affidavit sworn on 31st October, 2013 by Thomas Didimu Kashililah, Clerk of the National Assembly of Tanzania and on 1st November, 2013, he filed another Affidavit sworn on 31st October, 2013 by Oscar Godfrey Mtenda, Chief Parliamentary Legal Counsel in the National Assembly of Tanzania.

5. Both Parties also filed written submissions in support of their rival positions in the Reference.

B. REPRESENTATION

6. Mr. Edson Mbogoro represented the Applicant while Mr. Obadiah Kameya and Mr. Mark Mulwambo represented the Respondent.

C. FACTUAL BACKGROUND

7. From the pleadings filed by the Parties, it is the manner in which the process envisaged under Article 50(1) of the Treaty was undertaken by the National Assembly of Tanzania on or prior to the 17th April, 2012 that is the subject of this Reference. That Article provides that:

> **"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."

8. The issues arising from the election of Tanzania's representatives to EALA on 17th April 2012, pursuant to the above provision will shortly become apparent.

D. THE APPLICANT'S CASE

9. The Applicant, in his Reference and in all the supporting pleadings elsewhere mentioned above, has set out his case as here below:

Firstly, that during the election for Tanzania's representatives to the EALA, the Speaker of the National Assembly of Tanzania conducted the election in four categories of representation contrary to the express provisions of Article 50(1) of the Treaty. Those categories were:

i. Group A - Women
ii. Group B - Zanzibar
iii. Group C - Opposition Political Parties
iv. Group D - Tanzania Mainland.

Secondly, that had the proper formulae been applied, the Applicant, as the sole candidate offered for election by his political party of choice, CHADEMA, would have been elected to the EALA but instead the skewed Rules ensured that he was not elected and candidates offered by smaller parties like Civic United Front (CUF) and NCCR – Mageuzi were elected instead.

Thirdly, during the election, Article 50 was further violated when a political party, Tanzania Democratic Alliance (TADEA) was allowed to field a candidate while it had no representation at all in the National Assembly.

Fourthly, that a proper interpretation of Article 50 as read with this Court's decision in the **Anyang' Nyong'o** Case (i.e. **Anyang' Nyong'o & others vs. AG. of Kenya and Others, Ref. No.1 of 2006)**, would have led to the following formulae of elections to the EALA:

i. Group A - Gender (specifically women)
ii. Group B - Zanzibar
iii. Group C - Official Opposition Political Party
iv. Group D - Other Opposition Political Parties
v. Group E - Tanzania Mainland

E. ORAL EVIDENCE TENDERED BY THE APPLICANT

10. It is important to note at this stage that the Applicant tendered oral evidence and was cross-examined by Counsel for the Respondent and also called one witness, John Mnyika, the Member of Parliament for Ubungo Constituency and Director of Information and Publicity for CHADEMA, in support of his case.

11. While the Applicant in his oral evidence largely reiterated his case as summarized elsewhere above, John Mnyika went further to clarify the basis for the proposition that CHADEMA was entitled to representation in the EALA. His evidence in that regard was that CHADEMA has 49 Members in the National Assembly of Tanzania while Chama Cha Mapinduzi (CCM) has 258 Members and CUF

has 36 Members and therefore, in his view and in CHADEMA's view, their representation in EALA ought to be mathematically calculated at 14%, 74% and 10%,respectively, so that:

i. CHADEMA would have one (1) member in EALA;

ii. CCM would have seven (7) Members and,

iii. CUF would have one (1) Member.

12. It is instructive to note that Tanzania, like all other EAC Partner States, is entitled to nine (9) members in the EALA and so according to him, the above formulae would cater for all political parties in order of their numerical strengths in the National Assembly. In addition and to meet the gender and other criteria set out in Article 50(1) of the Treaty, Mnyika's evidence was that since CCM would have been entitled to seven (7) members under the above proposal, then it was up to CCM to ensure that those other groups and categories are catered for in the quota allocated to it. It would seem therefore that his position and that of the Applicant is that all those other categories and groups would somehow find representation in CCM prior to and during the election as opposed to having their distinct and separate representation at the election and later at the EALA.

13. He also explained what efforts he had made within the National Assembly to have the above proposal passed but he was unsuccessful hence his support for the orders sought in the Reference.

14. Lastly, it was the Applicant's submission that for all the above reasons, the following orders should be granted in his favour :

i. **Declaration that the election for Members of the East African Legislative Assembly conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the Treaty for the Establishment of the East African Community;**

ii. **Declaration that in obtaining the representatives from Groups C and D, Article 50 of the Treaty for the Establishment of the East African Community envisages, inter alia, the observance and compliance of the principle of proportional representation;**

iii. **Order prohibiting the Parliament of Tanzania from further violation of Article 50 of the Treaty for the Establishment of the East African Community by not complying with the principle of proportional representation and allowing candidates from political parties which are not represented in the National Assembly to contest in the said election; and**

iv. **Order that the costs of this Reference be made by the Respondent".**

F. THE RESPONDENT'S CASE

15. The Respondent, from the outset and by his Notice of Preliminary Objection seeks that the Reference should be struck off on the grounds that:

i. ***It is frivolous, vexatious and an abuse of Court process;***

ii. ***It is wrongfully before this Court and is contrary to the Rules of Procedure of this Court; and***

iii. ***It is without merit and should be dismissed for being res sub-judice.***

16. In submissions, Counsel for the Respondent argued that the Reference is frivolous, vexatious and an abuse of Court process because, instead of applying for the High Court in Dodoma to refer the dispute before it in **Petition No.1 of 2012,** on the same subject matter, for a preliminary ruling of this Court under Article 34 of the Treaty, the Applicant ignored that procedure and filed the present Reference. That the said action, it is urged, amounts to a deliberate disregard of the Law and this Court's Procedures.

17. As to whether or not the Reference is improperly before the Court, the Respondent's submission is that the copy of the Hansard of the National Assembly annexed to the Reference was illegally obtained and should not be used in these proceedings. In that regard, that without any proper document to support it, then the Reference is not properly before the Court and should be struck off.

18. Regarding the Claim of *res sub-judice*, it is the Respondent's case that **Petition No.1 of 2012** aforesaid had a prayer to the effect that a declaration should be made that Article 50 of the Treaty had not been complied with in the elections to the EALA and since the same prayer has been replicated in this Reference, then the doctrine of *res sub-judice* must be invoked and the Reference struck off.

19. The Respondent in the alternative seeks that the Reference should be dismissed for lack of merit because:

Firstly, the operative words in Article 50(1) are **"as much as is feasible"** in ensuring the representation set out therein. Further, that, in interpreting the said Article, the National Assembly of Tanzania considered that for there to be **"feasibility"**, the four categories created under Rule 5(5) of the EALA Election Rules should be the basis for the election and that the said categories are, in his view, lawful within the meaning of Article 50(1) aforesaid and the interpretation given to it by this Court in **Anyang' Nyong'o (supra)**;

Secondly, that **"proportional representation"** in the unique context of Tanzania was neither possible nor practical because of the necessity to bring on board Zanzibar as a special interest category and conversely, the Official Opposition Political Party could not be considered a separate category or special interest group as opposed to other opposition political parties;

Thirdly, the fact that TADEA fielded a candidate for election was within the provisions of the EALA Elections Rules as every opposition political party was entitled to do so under those Rules;

Fourthly, that CHADEMA had the opportunity to field three candidates in every category in the election, but it chose to field only one candidate in the entire election and when the candidate was unsuccessful in his bid, then such failure

cannot be attributed to non-compliance with Article 50(1) of the Treaty; and

Fifthly, an election is not akin to a nomination and no candidate in a contested election is assured of an automatic election. In that regard, the Applicant's assumption that, as the sole candidate offered by CHADEMA to contest the EALA election, then he was assured of being elected, was a misplaced assumption not backed by reality and the Law.

20. For the above reasons, the Respondent prays that the Reference should be dismissed with costs.

G. APPLICANT'S RESPONSE TO THE PRELIMINARY OBJECTION

21. The Applicant in answer to the Notice of Preliminary objection filed by the Respondent stated that:

a) The Reference was neither frivolous, vexatious nor an abuse of Court process and in the context of the definition of those words in the **Black's Law Dictionary, 5th Edition**, the Respondent's submission in that regard was misguided. In any event, that the Applicant has shown a sufficient interest in the matter at hand and the decision of the Court, if made in his favour, would assure that in future elections to the EALA, Tanzania would ensure that the Ruling Political Party does not abuse its majority numbers in Parliament to the detriment of the Official Opposition Political Party; and

b) The Reference is properly before the Court and the submission to the contrary is vague and does not disclose what provisions of the Law have been violated and in any

event, the objection as framed in submissions is not a pure point of law and cannot pass the threshold of a preliminary objection as expressed in **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E. A 696** per Sir Newbold.

22. The argument made in that regard is that whereas a copy of the Hansard of the National Assembly was obtained and filed in this Court without the special leave of the Assembly under section 19(1) of the Parliamentary Immunities, Powers and Privileges Act, Cap.296 Laws of Tanzania, even if that Hansard were to be expunged from the record, the Reference, premised on other independent evidence, would still stand.

23. On the question whether the Reference is barred by the doctrine of *res sub-judice*, quoting S.10 of the Indian Civil Procedure Code and **Sarkar's Law of Civil Procedure, 8th Edition, Vol.1 at page 46**, Counsel for the Applicant submitted that, looking at the prayers in **Petition No.1 of 2012** in the High Court at Dodoma vis-à-vis the present Reference, it is clear that in the two suits, the only common issue is that the previous suit is still pending before the High Court aforesaid. Further, it is urged that, contrary to the Respondent's assertion, the High Court at Dodoma has no jurisdiction to interpret the Treaty and is therefore an incompetent Court in that regard and in any event, that the reliefs sought in both cases ***"are worlds apart".***

24. The Applicant, for the above reasons, is therefore of the firm view that the Preliminary Objections are without merit and should be overruled.

H. SCHEDULING CONFERENCE

25. At the Scheduling Conference held on 6th September, 2013, Parties agreed on the following issues:

i. **That the Parliament of the United Republic of Tanzania held election of Members of the East African Legislative Assembly on the 17th day of April 2012 and the Claimant participated in the election as a contestant but was unsuccessful;**

ii. **According to Article 50 of the Treaty for the Establishment of the East African Community, the election of contestants to the East African Legislative Assembly should have representation as much as it is feasible from 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;**

iii. **The procedure that was adopted by the Tanzanian Parliament in conducting the said elections was by creating four categories of representation namely:**

   a) ***Group A*** - ***Gender***
   b) ***Group B*** - ***Tanzania Zanzibar***
   c) ***Group C*** - ***Opposition Political Parties***
   d) ***Group D*** - ***Tanzania Mainland***

iv. **That the Claimant contested through Group C which was meant for Opposition Political Parties; and**

v. **One contestant, a member from TADEA, a political party contested under Group D - Tanzania Mainland.**

IX. **POINTS OF DISAGREEMENT/ISSUES FOR DETERMINATION**

i. Whether or not the Reference before this Court is frivolous, vexatious and an abuse of the Court process;

ii. Whether or not, the Reference is wrongfully before this Court and is contrary to the Rules of Procedure of the Court;

iii. Whether or not, the Reference has no merit and should be dismissed for being *res sub-judice;*

iv. Whether or not, the Parliament of the United Republic of Tanzania violated Article 50 of the Treat for the Establishment of the East African Community by formulating groups of categories for contestants namely:

a) Group A - Gender
b) Group B - Tanzania Zanzibar
c) Group C - Opposition Political Parties
d) Group D - Tanzania mainland

v. Whether or not, the election of Members of the East African Legislative Assembly on the basis of groups C and D categories violated the Principle of Proportional Representation as provided for under Article 50 of the Treaty for the Establishment of the East African Community;

vi. Whether or not, the failure of CHADEMA to get a single representative in the East African Legislative Assembly was

caused by non-compliance with Article 50 of the Treaty for the Establishment of the East African Community;

vii. Whether or not, Article 50 of the Treaty for the Establishment of the East African Community provides a right for representatives of the Official Opposition Party in Parliament to an automatic chance of representation in the East African Legislative Assembly; and

viii. Whether or not, the Parties are entitled to the remedies sought.

J. DETERMINATION

26. We have considered the matter in the context of the pleadings and submissions made by both Parties and we find it prudent to begin by addressing the three issues raised in the Notice of Preliminary Objection filed together with the Response to the Reference by the Respondent. Those issues are in any event issues Nos. I, II, and III in the points of disagreement and which we are required to determine.

K. Issue No.1: Whether or not the Reference before this Court is frivolous, vexatious and an abuse of the Court process:

27. The Respondent has urged the point that because the Applicant filed a separate suit at the High Court in Dodoma (**Petition No. 1 of 2012**), then he had alternative remedies available to him in that Court and he ought not to have filed the instant Reference. Further, that he should only have approached this Court by way of a preliminary ruling under Article 34 of the Treaty.

28. On our part, we deem it fit to look at the Reference holistically. In doing so, it is obvious to us that the Reference is primarily based on an interpretation of Article 50 of the Treaty and whether the election conducted in the National Assembly of Tanzania on 17th April 2012 met the expectation and the threshold created by that Article.

29. That issue is certainly not frivolous, vexatious nor an abuse of Court process because under Article 27 of the Treaty, it is the mandate of this Court to interpret and apply the Treaty in matters placed before it for determination.

30. As regards the issue whether any person was properly elected under Article 50 aforesaid, Article 52 of the Treaty provides as follows:

> **"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 institutions for the Partner State that determines questions of the election of members of the National Assembly for the election in question; and**
>
> **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."**

31. The Applicant, it is obvious to us, filed **Petition No.1 of 2012** at the High Court in Dodoma to challenge the election of certain persons to the EALA pursuant to the above Article. The Reference on the other hand challenges the interpretation given to Article 50(1) of the Treaty by the National Assembly in promulgating Rules

to govern the conduct of an election under that sub-Article as opposed to the election *per se* and this can be seen from the prayers in the Reference which have been set out above.

32. The Reference is also only one in a long series that this Court has had to determine in similar circumstances. In **Christopher Mtikila vs. AG of Tanzania and Others, Reference No.2 of 2007,** for example, this Court declined to entertain and instead opted to strike out the Reference and in doing so, partly stated as follows:

> **"We are at one with Mr Mwalimu when he referred us to page 20 of the judgment of this Court in Prof. Anyang' Nyong'o where it was said:**
>
> ***'We agree that if the only subject matter of the Reference were those circumstances surrounding the substitution of the 3rd interveners for the said four Claimants, this Court would have no jurisdiction over the Reference.'***
>
> **In that Reference, four Claimants averred that they had been properly nominated by their political parties within NARC but that the Chief Whip unilaterally and pompously sent in his list of names which excluded the four names. The Court said that if it was only called upon to substitute names, that is, act as if there was an election petition, the court would not have jurisdiction. That would have been properly the domain of the Kenyan Courts. That is also the case with regard to this Reference – the declaration that two persons were improperly elected and that they**

are not Members of the Legislative Assembly is the domain of the High Court of Tanzania and not this Court.

We, therefore, hold that this Court has no jurisdiction to entertain this Application which seeks to annul the elections held by the National Assembly in October, 2006. We allow the preliminary objection raised and dismiss the Reference with costs for one advocate for each Respondent."

33. We agree with the above holding and would only add that the fact that there is a petition pending at the High Court in Dodoma would not by that fact alone oust the jurisdiction of this Court and whether or not that Court had invoked Article 34 of the Treaty, would have made no difference in that regard.

34. Article 34, for avoidance of doubt, provides that:

"Where a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall, if it considers that a ruling on the question is necessary to enable it give judgment, request the Court to give a preliminary ruling on the question."

35. While the High Court at Dodoma has not sought any preliminary ruling on any question placed before it pursuant to the above Article, we are certain that the Reference as framed and argued, raises triable issues properly within the mandate and

jurisdiction of this Court and is therefore neither frivolous and vexatious nor an abuse of the Court process, as argued by the Respondent.

36. We accordingly overrule this limb of the Preliminary Objection.

L. Issue No.2: Whether or not, the Reference is wrongfully before this Court and is contrary to the Rules of Procedure of this Court:

37. The issue arising here is whether the Hansard of the National Assembly of Tanzania was unlawfully procured and whether it can form part of the evidence to be considered by this Court.

38. We shall take very little time with this issue because whereas there is no evidence that the Applicant obtained leave of the National Assembly pursuant to S.19 of the Parliamentary Immunities, Powers and Privileges Act before introducing the Hansard Report of 17th April, 2012 as evidence in this Court, the record would show that such leave was sought on 20th December, 2013, and obtained on 31st December, 2013. Time notwithstanding therefore, as at the date of the hearing, the Hansard Report was before this Court and was liberally referred to by both Parties. In any event, John Mnyika, a member of the National Assembly and who was deeply involved in the proceedings of the National Assembly on the material day, also gave oral evidence in Court and largely confirmed the contents of the said Hansard Report.

39. The wider interests of justice would in the circumstances necessitate that we should accept and admit the Report as properly filed, and overrule the objection as framed above.

M. Issue No.3: Whether or not, the Reference has no merit and should be dismissed for being *res sub-judice*:

40. The merit of the Reference or lack thereof is a matter to be considered in its totality and after all aspects of it have been determined and so at this stage, we shall only apply our minds to the issue whether it is barred by the doctrine of *res sub-judice.* In the **Lawdictionary.org (Black's Dictionary online)**, *"sub-judice"* is defined as the Latin term for ***"under a Judge; a matter or case that is before a judge or court for etermination"***.*Res sub-judice* is the rule that stops multiplicity of litigation and gives a boost to meaningful and serious litigants only. It is the Respondent's contention in this regard that all the prayers in the Reference have also been sought in **Petition No.1 of 2012** pending before the High Court in Dodoma and therefore, this Petition is barred by the doctrine of *res sub-judice.*

41. We also note that in invoking S.10 of the Indian Code of Civil Procedure and **Sakar on the Law of Civil Procedure**, the Respondent argued that the issues in contention are the same in both the case before the High Court in Dodoma and the present Reference; that the Parties are the same and the High Court in Dodoma is competent to grant all the reliefs now being sought and therefore the Reference is consequently barred by the doctrine of *res sub-judice.*

42. In our view, and upon considering this issue, nothing could be farther from the truth. We say so because, the interpretation and application of the Treaty under Article 27 as read with Article 50 thereof is a mandate conferred on this Court. Yet, and on the other hand, the jurisdiction under Article 52(1) of the Treaty is reserved

for institutions in Partner States, including the High Court in Dodoma, and this Court has no jurisdiction in that regard. For avoidance of doubt, that Article provides that questions as to membership of the Assembly shall be determined by institutions of the Partner States that determine questions of elections to their respective National Assemblies. In Tanzania, it is agreed that the said institution is the High Court.

43. Even if therefore, the Parties in both the Petition pending before the High Court and the present Reference may be the same, and the election of 17th April 2012 may be the general subject matter of both cases, the competence of the two Courts would exclude the principle of *res sub-judice.* Similarly, the doctrine of *res judicata,* even if it had been invoked, cannot apply as none of the two Courts have conclusively determined any aspect of the subject matter of the present dispute.

44. For the above reasons, the objection as framed above is overruled.

N. Issue No.4: Whether or not, the Parliament of the United Republic of Tanzania violated Article 50 of the Treaty for the Establishment of the East African Community by formulating groups of categories for contestants namely: Group A - Gender, Group B - Tanzania Zanzibar, Group C - Opposition Political Parties and Group D - Tanzania Mainland:

45. Elsewhere above, we alluded to the contested interpretation given to Article 50(1) of the Treaty by the Applicant (and CHADEMA) as well as the Respondent.

46. At the hearing of the Reference, the rationale for the two positions was explained as being the uniqueness of Tanzania based on the Union between Tanzania Mainland and Zanzibar, the number of Members of the National Assembly that various Political Parties have in Parliament and the existence of an Official Opposition Political Party.

47. Further in the course of submissions, Parties grappled with the meanings to be attributed to the terms **"*proportional representation*"** and ***"as much as feasible"*** and a clear appreciation of Article 50(1) is therefore important as a starting point to addressing those issues. Article 50(1) of the Treaty provides as follows:

> **"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."**

48. In **Anyang' Nyong'o (supra)**, the Court stated as follows regarding the words **"*election*"** and **"*elect*":**

> **"The words "*election*" and "*elect*" as used in Article 50 do not necessarily connote choosing or selecting by voting. They are not defined in the Treaty. Black's Law Dictionary defines election as '*the process of selecting a person to occupy an office (usually a public office)*'.**

Furthermore, though under Article 6 of the Treaty the Partner States are committed to adhere to "*democratic principles*", no specific notion of democracy is written into the Article or the Treaty. Besides, while Article 50 provides for the National Assembly of each Partner State to elect nine members of the Assembly, 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 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. This is in recognition of the fact that each Partner State has its peculiar circumstances to take into account. The essence of the provision in Article 50 is that '*the National Assembly of each Partner State shall elect ....nine Members of the Assembly ... in accordance with such procedure as [it] may determine'...*"

49. The point made by the Court above is that as regards the procedure and content of the Rules to be followed in an election for representatives to the EALA, the Court cannot assume that responsibility and in fact concluded that:

"if the Court undertakes the task of giving a 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."

50. What then are the Rules that the National Assembly of Tanzania enacted for the purpose of an election under Article 50(1)? It is not contested that the East African Legislative Assembly Election Rules were enacted in 2007 pursuant to Article 50 of the Treaty and Standing Order No.12 of the Parliamentary Standing Orders. Rule 5(5) therefore provides as follows:

> **"Any Political Party which is entitled to sponsor candidates may submit to the Returning Officer, the names of three candidates for each vacant seat in the following relevant groups:**
>
> ***(a) Group A: Women***
> ***(b) Group B: Zanzibar***
> ***(c) Group C: Opposition Parties***
> ***(d) Group D: Tanzania Mainland"(Emphasis added)***

51. The above criteria is heavily contested and while the Respondent has submitted that it fits the expectations of Article 50(1), the Applicant has suggested other criterion which is as follows:

> **Category A - Women**
> **Category B - Zanzibar**
> **Category C - Official Opposition Political Party**
> **Category D - Other Opposition Political Parties**
> **Category E - Tanzania Mainland**

52. John Mnyika, however, added in his evidence that the lawful and correct criteria should have been that the Political Parties based on their representation in Parliament, should have divided the nine

available slots amongst themselves and thereafter, the Ruling Party should ensure that **"as much as is feasible",** all the other categories including Zanzibar, Tanzania Mainland, gender and special interest groups would be accommodated in the seven (7) positions reserved for it. This approach, in his view, is the only one way of ensuring that there would be **"proportional representation"** within the meaning of Article 50 of the Treaty.

53. Turning back therefore, to the two terms, **"*as much as is feasible*"** and "***proportional representation***" within the meaning of Article 50(1), **"feasibility"** is defined in the **Cambridge Advanced Learner's Dictionary, Third Edition** *as* ***"whether something can be made, done or is achieved, or is reasonable".*** "***Proportional Representation***" is then defined in **Black's Law Dictionary, Ninth Edition** as **"an electoral system that allocates seats to each political group in proportion to its popular voting strength ... the term refers to two related but distinguishable concepts: *proportional outcome* (having members of a group elected in proportion to their numbers in the electorate) and *proportional involvement* (more precisely termed as proportional voting and denoting the electoral system also known as *single transferable voting*)".**

54. While Article 50(1) of the Treaty does not expressly use the words ***"proportional representation"***, the Applicant, on the basis of Standing Order No.12 of the Standing Orders of the Tanzania Parliament has argued that these words must apply to any election under Article 50(1). Standing Order No.12 in that regard states that:

"Election of members of parliament in other organs which by virtue of the law establishing those organs must have parliamentary representative and election of the members of the East African Legislative Assembly will as much as feasible, reflect the proportional representation of various political parties with representation in parliament, gender and representation of the two sides of the union."(Emphasis added)

55. The above position must then be read with Rule 5(5) aforesaid which for clarity reads partly as follows:

"Any political party which is entitled to sponsor candidates may submit to the Returning Officer, the names of three candidates for each vacant seat in the following relevant groups"(emphasis added)

56. As can be seen from a plain reading of the above provisions, the National Assembly of Tanzania, in its wisdom, decided that ***"proportional representation of the various political parties with representation in parliament"*** will be the main criteria in meeting the threshold in Article 50. In addition, women and representation of the two sides of the Union (Zanzibar and Tanzania Mainland) are also created as specific groups to be represented within that larger grouping.

57. We say so because in the proceedings of the National Assembly on 17th April 2012, the Speaker is recorded as giving guidance to Members of the Assembly on the interpretation of the Standing Orders and Election Rules for representation in the EALA and she used the following words:

"Group A is for women candidates from the ruling party and the opposition parties and also other political parties with permanent registration....

Group B is from Zanzibar (men and women) from the ruling party and opposition parties with permanent registration....

Group C is for candidates from opposition parties in the National Assembly (men and women) from both sides of the Union....

Group D is for Tanzania Mainland (men and women) from the ruling party, opposition parties and other political parties with permanent registration...."

58. The election was then conducted along the above lines and in fact the Clerk of the National Assembly also confirmed to the Assembly on the material date that by 10th April 2012, he had received thirty three names from CCM, CUF, NCCR-MAGEUZI, UDP, TLP, CHADEMA AND TADEA, all political parties, for purposes of the election for representatives to the EALA.

59. Reading the above statements and Rule 5(5) above, in the context of Article 50(1), the latter provides the following categories of specific representation:

i. **Gender**
ii. **Various Political Parties represented in the National Assembly;**
iii. **Shades of opinion; and**
iv. **Other Special Interest Groups.**

60. It seems to us that, subject to what we shall say later, Standing Order No.12 and Rule 5(5) above, seem to have catered for the following categories but in a very different manner:

> **i) Political parties not necessarily represented in the National Assembly** (although as can be seen above, **"political parties with permanent registration"** was the term used);
>
> **ii) Gender** (specifically women); and
>
> **iii) Zanzibar and Tanzania Mainland** (probably as special interest groups although nowhere is that term mentioned)

61. Where then is the place of ***"shades of opinion"*** in Standing Order No.12 and Rule 5(5), which term is expressly used in Article 50(1)? The expression is elusive but it has been defined in **the Longman Dictionary of Contemporary English (online edition)** as meaning ***"slightly different from other ones"*** *e.g.* ***"there is room in the Democratic Party for many shades of opinions."*** Taking that broad definition, can it be said that Standing Order 12 and Rule 5(5) have taken into account **"shades of opinion"** in their categorization? To the extent that it was completely left out as a category in the election, then there may be incompleteness in the Standing Order and Rules but in the totality of things, their entire formulation, if read liberally, may well indicate different shades of opinion running through the categories in the Assembly's attempt at applying the feasibility principle.

62. Similarly, the Standing Orders and the Rules do not make any reference to **"special interest group".** The term has been defined

in **"Britannica Online"** as **"...a formally organized association that seeks to influence public policy"** and in the case of **Among Anita vs AG of Uganda,Reference No.6 Of 2012,** this Court included the youth and persons with disabilities as special interest groups. In the present Reference, Parties made no mention of this obvious lacunae in the law as enacted by the National Assembly of Tanzania and therefore in the ultimate adherence to the language of Article 50(1).

63. In any event, and having raised the above concerns, what seems to be an issue before us is the interpretation to be given to category (i) above; various political parties represented in the National Assembly. Standing Order No.12 and Rule 5(5) have deliberately created only one category of representation i.e. political parties. The Applicant on the other hand, while in support of that approach to the election for the EALA, nonetheless argues for separation thereof, so that the Official Opposition Political Party and Other Opposition Political Parties would have separate slots, both in the election and in the ultimate representation at the EALA. In the circumstances and weighing both positions against the other, which view is correct?

64. In our respectful view, both views are wrong. We say so because Rule 5(5) creates political parties as the sole basis for an election under Article 50 and all other categories such as gender, special interest groups and shades of opinion are subsumed in that single category, hence the language of Rule 5(5) that:

> **"Any political party which is entitled to sponsor candidates may submit to the returning officer names of**

three candidates for each vacant seat in the following categories..." (Emphasis added)

65. In reading the above provision, one must also bear in mind the words of the Speaker above while giving guidance to Members of the National Assembly before the election. We have no doubt that in enacting that sub-Rule, the National Assembly of Tanzania did not adhere to the expectation of Article 50(1) that each category of representation should as much as feasible be a separate and distinct category from each other. To lump all categories under **"any political party which is entitled to sponsor candidates"** and then grant that one category the preserve to bring candidates for the other categories, so that ultimately every candidate and eventual representative would be affiliated to a political party, whether or not represented in the National Assembly, as opposed to say shades of opinion, gender and other special interest groups, would be a clear violation of Article 50(1) of the Treaty.

66. In holding as we have done above, both the Applicant and the Respondent also seem to be of the view that political parties must have some guarantee of representation in the EALA hence their categorization along political party lines only, even in the case of Zanzibar, which in all sense must remain in a special category in Tanzania for reasons of its unique position in the Union. In addressing that issue, we can do no better than agree with the finding of this Court in **Abdu Katuntu vs. Attorney General of Uganda, Reference No. 5 of** 2012 where we stated thus:

"On the issue at hand, it is apparent from the Applicant's pleading and the submissions, that the Applicant's main

complaint is that the Rules of Procedure are not in conformity with Article 50 of the Treaty, basically on the grounds that the Rules did not guarantee a slot in 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 Parliament of Uganda and that each had a chance to nominate candidates to stand for election on the Election Day for members of EALA;

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

67. Similarly, in **Among Anita (supra**) the Court stated that **"...no such guarantee exists for all political parties represented in Parliament or any other group specified in Article 50(1)."**

68. In the same case, the Court was emphatic that the same position would apply to all other groups mentioned in Article 50(1) and in doing so, it stated thus:

"It is also our view that, contrary to the Applicant's assertion, there is no requirement to be deduced from Article 50(1) of the Treaty that the said election rules should provide for specific slots for the interest groups set out in the Article or that they should provide for guarantees of representation, specifically of women, youth and persons with disability or any specified grouping provided for by Article 50(1) where such representation is not "feasible." This Court is not

clothed with the jurisdiction to determine such feasibility which is, in any event, left to the discretion of the National Assemblies of Partner States".

69. We reiterate the above findings in the context of this Reference and the said findings would also squarely address both the argument that CHADEMA as the Official Opposition Political Party and the Applicant, as its sole nominee to the EALA, were entitled to automatic representation in that Assembly. All that is expected of the Rules is that:

"the Election Rules must enable the establishment of an electoral process that ensures equal opportunity to become a candidate, full participation and competition for specified groupings and at the end of the process, their effective representation in the EALA" – See Katuntu (supra) at page 27.

70. We completely agree with that holding and to conclude on this aspect of the Reference, it is our finding that by formulating Standing Order No. 12 and Rule 5(5) whose effect was to predicate an election under Article 50(1) of the Treaty on representation by political parties only and thereafter creating categories as elsewhere set out, the National Assembly of the United Republic of Tanzania violated Article 50(1) of the Treaty.

O. Issue No.5: Whether or not, the election of Members of the East African Legislative Assembly on the basis of groups C and D categories violated the Principle of proportional representation as provided for under Article 50 of the Treaty for the Establishment of the East African Community:

71. For avoidance of doubt, category C is Opposition Political Parties and category D is Tanzania Mainland and while categorization and feasibility is otherwise a matter for the National Assembly of Tanzania, once the only criteria and category set by the Rules is that of representation of political parties, then to that extent only, the categorization to create slots for opposition political parties, generally, and Tanzania Mainland under that larger categorization is certainly a violation of Article 50(1) of the Treaty. The reason for that finding is the same as in issue No.4 (above).

72. The other issue arising from the Reference and submissions is that of TADEA which has no representation in the National Assembly but was allowed the opportunity to field a candidate, one Lifa Chipaka, in the election of 17th April, 2012.

73. The above issue requires no more than a firm finding that under Article 50(1), the words ***"various political parties represented in the National Assembly"***, if interpreted literally would mean that a political party with no representation in Parliament cannot field a candidate for election to the EALA. Lifa Chipaka, could of course have presented himself for election under any other grouping specified in Article 50 (1) other than political parties represented in the National Assembly because TADEA had no capacity to field him as such.

74. The answer to issue No.5 is therefore that to the extent only that Rule 5(5) aforesaid creates only one group as a basis for an election under Article 50(1), then the further creation of categories C and D above was an act in violation of the Treaty.

75. Similarly, it was a violation of the Treaty for TADEA, a non – parliamentary political party to field one, Lifa Chipaka, as a candidate in its name for the election of 17th April, 2012.In holding as above, it matters not that TADEA fielded Chipaka under the category of Tanzania Mainland. TADEA had no role at all in the election.

P. Issue No.6: Whether or not, the failure of CHADEMA to get a single representative in the East African Legislative Assembly was caused by non-compliance with Article 50 of the Treaty for the Establishment of the East African Community:

76. We have already made a finding that no group under Article 50(1), including a political a party, is guaranteed representation in the EALA. We reiterate that finding and with regard to CHADEMA specifically, no such a guarantee exists.

77. In addition, it would defeat the whole purpose of an election to guarantee the outcome thereof yet Article 50(1) of the Treaty obligates the National Assembly to conduct an election after creating Rules of Procedure for that purpose. Whether or not Article 50(1) was therefore violated, no guarantee to the Applicant or CHADEMA existed or exists and so this issue must be answered in the negative.

Q. Issue No.7-Whether or not, Article 50 of the Treaty for the Establishment of the East African Community provides a right for representatives of the official opposition party in Parliament to an automatic chance of representation:

78. Our findings above are a clear answer to the above issue and we reiterate our findings in that regard.

R. Issue No.8: Whether or not, the Parties are entitled to the remedies sought:

79. We have addressed all the seven core issues framed for determination and at this stage, we must revisit the specific prayers that the Applicant had sought in the Reference.

80. Prayer No.(i): A declaration that the election for members of the fast African Legislative Assembly conducted by the Parliament of Tanzania on 17/4/2012 was in flagrant violation of Article 50 of the Treaty.

81. In our analysis above, we reached the conclusion that our jurisdiction is limited to determining whether the criteria in Standing Order No. 12 as read with Rule 5(5) of the Election Rules was consistent with Article 50 of the Treaty. The question whether the present members of the EALA representing Tanzania were otherwise properly elected or not is a matter to be determined by the National Courts of Tanzania.

82. Our conclusion on the above issue therefore is that to the extent only that the rules for election of Tanzania's representatives to the EALA are framed in such a way as to make political parties the sole grouping under Article 50 to form the basis for an election, then there was violation of the Treaty by the National Assembly of Tanzania. The prayer is consequently granted in those terms only.

83. Prayer (ii): A declaration that in obtaining the representatives from group C and D, Article 50 of the Treaty envisages inter alia, the

observance and compliance of the principle of proportional representation.

84. Our finding on this prayer is that the application of the principle of proportional representation in Standing Order No.12 and thereafter its execution in rule 5(5) does not flow from the language, tenor and spirit of Article 50(1) of the Treaty. In **Katuntu (supra),** this Court emphatically stated as follows:

> **"…. We conclude by saying that the meaning and import of Article 50(1) of the Treaty does not require that all six political parties represented in Parliament of Uganda should be represented in the EALA"**

85. In reaching the above conclusion, the Court dismissed the submission by Counsel for the Applicant, similar to submissions in this Reference that "**….the Treaty envisages some concept of proportional representation, in contradiction to 'winner takes all!"**

86. The above prayer cannot be granted for the above reasons.

87. Prayer (iii) An order prohibiting the Parliament of Tanzania from further violation of Article 50 of the Treaty by not complying with the principle of proportional representation and allowing candidates from political parties which are not represented in the National Assembly to contest in the said election.

88. We have partly answered the above prayer while addressing prayer no. (ii) and we reiterate our findings on the application of the principle of proportional representation. As regards the issue of non-parliamentary political parties fielding candidates in an

election under Article 50(1), we have already stated that the said Article by use of the words **"the various political parties represented in the National Assembly"** could not have also intended that other political parties (without representatives in the National Assembly) could also field candidates as such. TADEA had no capacity to field a candidate for election and to have been allowed to do so was a violation of Article 50(1) of the Treaty by the National Assembly of Tanzania.

89. In the event, the above prayer is partly granted.

90. Prayer No.(iv) – an order that the costs of this Reference be paid by the Respondent.

91. Rule 111(1) provides that costs shall follow the event unless the Court shall for good reasons otherwise order. In that regard, the Applicant has only partly succeeded and so we deem it fit that in the circumstances, he should be awarded a quarter of the costs.

S. CONCLUSION

92. Since the decision in **Anyang Nyong'o (supra),** this Court has, after every election for representatives to the EALA, received complaints from one Partner State or the other. The Court has been consistent in upholding the spirit, tenor, language and intent of Article 50(1) of the Treaty and it behoves upon the National Assemblies of Partner States to do the same. In saying so, we are alive to the unique political and social circumstances of each Partner State including Tanzania but that uniqueness is no excuse for not strictly following the dictates of the Treaty which they,

individually, freely entered into. In the instant case our findings are clear as regards the United Republic of Tanzania. We digress.

T. DISPOSITION

93. For all the above reasons, the final orders in this Reference are that:

a) Prayer (ii) of the Reference is dismissed;

b) Prayer (i) is granted in the following terms only:

> **"A declaration is hereby issued that to the extent that the election for members of the East African Legislative Assembly conducted by the National Assembly of Tanzania on 17th April, 2012 was premised on only political parties as the sole grouping as opposed to all the other groups envisaged in Article 50(1) of the Treaty, then the National Assembly of Tanzania violated the said Article."**

c) Prayer (iii) is granted in the following terms only:

> "**A declaration that by allowing a political party without representation in the National Assembly (TADEA) to field a candidate in the election of 17th April, 2012 for representatives to the EALA, then the National Assembly of Tanzania was in violation of Article 50(1) of the Treaty."**

d) The Applicant shall have a quarter costs of the Reference.

94. It is so ordered.

Dated, Delivered and Signed at Arusha this 26th Day of September 2014.

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JEAN BOSCO BUTASI

PRINCIPAL JUDGE

.....

ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

.....

FAUSTIN NTEZILYAYO

JUDGE