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

(Coram: Jean Bosco Butasi, PJ; Isaac Lenaola, DPJ; Faustin Ntezilyayo, J; Monica K. Mugenyi, J, & Fakihi A. Jundu, J)

REFERENCE No. 10 OF 2013

UNION TRADE CENTRE LTD (UTC) ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF
THE REPUBLIC OF RWANDA..... RESPONDENT

DATE: 27TH NOVEMBER 2014

JUDGMENT OF THE COURT

Introduction

1. This Reference was brought under Articles 5(3), 6(d), 7(1) and (2), 8(1), 27 and 30 of the Treaty for the Establishment of the East African Community (hereinafter referred to as 'the Treaty), as well as Rules 1(2) and 24 of the East African Court of Justice Rules of Procedure, 2013 (hereinafter referred to as 'the Rules).

2. The Union Trade Centre Limited (UTC), which is hereinafter referred to as 'the Applicant', seeks to hold the Government of the Republic of Rwanda responsible for acts of the Kigali City Abandoned Property Management Commission (hereinafter referred to as 'the Commission'), an entity that is set up under the internal laws of the Republic of Rwanda. The Government of Rwanda was represented herein by the office of the Attorney General of the Republic of Rwanda (hereinafter referred to as 'the Respondent').

3. At the hearing of this Reference the Applicant was represented by Mr. Francis Gimara while Mr. Aimable Malala appeared for the Respondent.

Applicant's case

4. On 20th May 1997, the Applicant was incorporated as a company limited by shares under the Rwanda Companies Act to run and manage the Union Trade Centre (UTC) mall in Kigali, Rwanda. On 1st August 2013, the Commission ordered the Applicant to avail it with specific information in respect of the company (UTC), which the latter did on 2nd August 2013. On 2nd October 2013, the Commission informed tenants in the UTC mall that effective 1st October 2013 they were required to redirect their rental payments to the Commission's Committee in charge

of unclaimed property. The Applicant thereupon filed this Reference contending that the Respondent's actions contravened Articles 5(3), 6(d), 7(1)(a) and (2), and 8(1) of the Treaty.

Respondent's case

5. The Respondent contested the Applicant's allegation and asserted that the acts complained of could not be attributed to a Partner State or an institution of the East African Community (EAC) so as to bring them within this Court's jurisdiction. In addition, the Respondent contended that it was not liable for the acts of the Commission given that the latter had its own legal personality. It was also the Respondent's contention that the filing of the present Reference was an abuse of court process in so far as the Applicant had filed another case against the Commission, namely, **Case No. 114/13/TC/NYGE**, the determination of which was still pending before a national court in Rwanda. Finally, the Respondent asserted that the Reference was filed out of time having been filed on 22nd November 2013, allegedly well beyond the prescribed time.

6. The Respondent thus raised two preliminary points of law; first, on the jurisdiction of this Court to entertain a Reference premised on actions of an entity that was neither a Partner State nor institution of the EAC, and secondly, on the limitation of time within which a reference may be brought before this Court. The Respondent filed a Notice of Preliminary Objection in that regard as prescribed by Rule 41 of the Court's Rules.

Scheduling Conference

7. Pursuant to Rule 53, a Scheduling Conference was held on 12th June 2014 and the parties framed the following issues:

   i. *Whether the acts complained of are acts of a Partner State or institution of the Community or whether the Attorney General of Rwanda was properly sued before this Honourable Court.*
   ii. *Whether the Reference is time-barred and should be struck off the record.*
   iii. *Whether the action of taking over the Applicant's mall by the Kigali City Abandoned Property Management Commission is inconsistent with and/ or in contravention of Articles 5, 6, 7 and 8 of the Treaty.*
   iv. *Whether the parties are entitled to the remedies sought.*

Preliminary points of law

8. Both Counsel argued the points of law posed in the first and second issues above prior to addressing this Court on the substantive Reference. We do adopt the same approach in this judgment given that the points of law raised could dispose of the entire Reference.

   Issue No.1 : Whether *the acts complained of are acts of a Partner State or institution of the Community or whether the Attorney General of Rwanda was properly sued before this Honourable Court.*

9 It was argued for the Applicant that Rwanda was responsible for the injury the Applicant suffered as a result of the Commission's actions. This argument was premised on the notion that under international law the acts or omissions of an organ of a State are attributable to that State as long as they occurred in an official capacity. In this regard, learned Counsel for the Applicant cited the International Law Commission's Articles on the

Responsibility of States for Internationally Wrongful Acts (hereinafter referred to as 'the ILC Articles') as reported in the **Yearbook of the International Law Commission, 2001, vol. II (Part Two)**. Mr. Gimara presented a two-dimensional facet to his contention that the conduct of the Commission was attributable to the State of Rwanda. First, learned Counsel argued that the Commission was an organ of the State of Rwanda within the precincts of Article 4 of the ILC Articles. Secondly, he asserted that the Commission had been empowered by the internal laws of Rwanda to exercise elements of governmental authority and therefore its actions were attributable to Rwanda under Article 5 of the ILC Articles.

10. Conversely, it was argued for the Respondent that the application of the ILC Articles was restricted to inter-State disputes and did not extend to a case initiated by a corporate person, as was the case presently. Learned Counsel for the Respondent did also contend that although the ILC Articles were indeed recognized customary international law, they did not take precedence over the Treaty which, in his view, is codified international law binding upon the EAC Partner States. Further, it was Mr. Malala's argument that the internal law of Rwanda designated the Mayor of Kigali City as the rightful party to disputes such as the present one, rather than the present Respondent. Counsel cited the case of **Modern Holdings Limited vs. Kenya Ports Authority EACJ Reference No. 1 of 2008** in support of his contention that it was only the acts of Partner State that could be litigated before this Court and not those of bodies such as the Commission whose actions are in issue presently.

Court's determination:

11. It is common ground herein that the ILC Articles do constitute customary international law. This position was stated in the case of **Noble Ventures Inc. vs. Romania ICSID Case No. ARB/01/11, 2005**, to which this Court was referred by learned Counsel for the Applicant.

12. In that case, a State-owned enterprise was divested to Noble Ventures Inc. by the Romanian State Ownership Fund (SOF), a public institution with legal personality that was responsible for the implementation of the Romanian Government's privatization program. The privatization agreement between Noble Ventures Inc. and SOF was grounded in an underlying bilateral investment treaty (BIT) between Romania and the United States of America (USA). Six months after the conclusion of the privatization transaction there was a change of Government in Romania, SOF was replaced by the Authority for the Privatisation and Management of the State Ownership (APAPS) and Noble Ventures Inc. encountered a series of operational problems arising from SOF's alleged derogation of its commitments under the privatization agreements. NobleVentures Inc. sought to hold Romania responsible for SOF's conduct, contending that it amounted to breach by Romania of its obligations under the BIT. It was held:

> "**As States are juridical persons, one always has to raise the question whether acts committed by natural persons who are allegedly in violation of international law are attributable to a State. The BIT does not provide any answer to this question. The rules of attribution can only be found in general international law which supplements the BIT in this respect. Regarding general**

international law on international responsibility, reference can be made to the Draft Articles on State Responsibility as adopted on second reading 2001 by the International Law Commission and as commended to the attention of Governments by the UN General Assembly in Res. 56/83 of 12 December 2001. While those Draft Articles are not binding, they are widely regarded as a codification of customary international law."

13. As indicated earlier in this judgment, learned Counsel for the Respondent did raise a question as to the applicability of the ILC Articles to this Court. The foregoing decision underscores the supplementary application of the ILC Articles to formal international treaties such as the EAC Treaty. The interface between the ILC Articles and the Treaty is further clarified in the Commentaries to the Articles, which are s imilarly reported in the **Yearbook of the International Law Commission** (supra). Our recourse to the ILC Articles'Commentaries is informed by the provisions of Articles 31(1) and (4), and 32 of the Vienna Convention on the Law of Treaties, 1969. The cited provisions are reproduced below:

Article 31

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

(2) ……..

(3) ……..

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

Article 32

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the application according to article 31:

(a) Leaves the meaning ambiguous or obscure, or
(b) **Leads to a result which is manifestly absurd or unreasonable."**

14. Over and above the ordinary meaning of terms prescribed by Article 31(1) of the Vienna Convention, Article 31(4) makes provision for special meanings of terms in a treaty if it is established that the special meaning was the intention of the parties thereto. In addition, Article 32 provides for recourse to supplementary means of interpretation, including the preparatory work of a treaty, in order to confirm the ordinary meaning of the terms thereof as prescribed by Article 31(1). In the instant case, although the ILC Articles are not a treaty in the strict legal sense, they are codified customary international law, the interpretation of which would be aptly guided by the principles advanced in Articles 31(4) and 32 of the Vienna Convention. The Commentaries establish the intention of the framers of the ILC Articles and, in so far as they accrue to the draft Articles, would constitute preparatory work to the ILC Articles. They are, therefore, legally recognized supplementary means of interpretation of the said Articles. Indeed, numerous international courts and arbitral tribunals do invariably refer to the Commentaries on the ILC Articles for a determination of State responsibility. *See* ***Phillips Petroleum Co. Iran vs. Islamic Republic of Iran, Award No. 326-10913-2, Iran-United States Claims Tribunal***

Reports, vol. 21 (1989) *and* ***Noble Ventures Inc. vs. Romania*** *(supra)*.

15. Paragraph 1 of the general commentary reported at page 31 of the Commentaries states:

> "**These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.**"

16. Thus where a primary rule exists that places an obligation under international law on a State, in the event that an allegation of non-compliance with such obligation is made against that State a number of other considerations would arise that the Articles seek to address. These considerations include the role of international law as distinct from the internal law of the State in characterizing conduct as unlawful, as well as a determination of the circumstances under which such conduct is attributable to the State as a subject of international law. *See paragraph 3 of the general commentary to the Articles*.

17. In the instant case, the primary 'rules' that place obligati0ns on Partner States would be found in the Treaty, while the ILC Articles would constitute supplementary rules that enable the Court determine whether the action or conduct in alleged contravention of a Treaty provision can be attributed to a Partner State so as to render it responsible for the alleged breach. To that extent, therefore, this Court would in principle be mandated to apply the ILC's Articles to disputes brought before it. The question, however, is the applicability of the Articles to the present dispute which pits a Partner State against a private juridical person.

18. The jurisdiction of this Court is clearly spelt out in Articles 27 and 30(1) of the Treaty. Article 27(1) grants the Court jurisdiction over the interpretation and application of the Treaty. Article 30(1) of the Treaty then prescribes what entities may refer a matter to the Court for determination, the entities against which such matter may be referred and the causes of action that the Court may adjudicate.

The Article reads:

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

The Treaty thus explicitly mandates natural or juridical persons that are resident in any of the Partner States to refer a dispute to this Court.

19. It is well recognized that conventional international law is derived from international treaties and conventions, and typically demarcated States as the main subjects thereof. Indeed, this was the argument of learned Counsel for the Respondent herein. However, individual persons are increasingly becoming recognized subjects of international law as well in so far as it (international law) imposes certain duties upon States with regard to such persons. Individual persons' recognition as participants in international law is, nonetheless, subject to the existence of specific provision therefor in an international treaty. In the absence of such provision, an individual person cannot bring a complaint; only a State of which s/he is a national would be mandated to complain of a violation before an international tribunal.

20. Applying the foregoing principles to the instant case, we find that the EAC Treaty does make provision for complaints by natural or juridical persons to this Court as outlined in Article 30(1) thereof, and thus recognizes them as subjects of international law in its legal regime. Further, it is quite clear that within the EAC legal regime the Treaty is the primary instrument that outlines the obligations of Partner States in the Community. The ILC Articles, on the other hand, are supplementary rules intended to enable this Court determine the culpability of Partner States for the acts or omissions of their organs. In the present context, the Articles are pertinent to a determination of the Respondent's culpability for the conduct of the Commission. We are satisfied, therefore, that the said Articles do apply to a dispute brought against a Partner State by a person resident in the Community, and do hereby disallow the submission of learned Counsel for the Respondent to the contrary.

21. Having so found, we revert to a consideration of the Respondent's culpability for the Commission's conduct. Learned Counsel for the Applicant relied on Articles 4 and 5 of the ILC Articles for his submission that the Commission's conduct was attributable to the State of Rwanda in so far as it was an organ thereof and/ or had been empowered by the laws of Rwanda to exercise elements of governmental authority. As quite rightly advanced by Mr. Gimara, Article 4(1) of the ILC Articles attributes the conduct of an organ of a State to that State regardless of whether that organ exercises a legislative, executive, judicial or other function. However, Article 4(2) defines an organ, the conduct of which would be attributable to a State, to include '**any person or entity which has that status in accordance with the internal law of the State**. That provision thus recognizes the applicability of a State's internal law to a determination of whether or not a party whose conduct is in issue is, in fact, an organ of the State. Indeed paragraph 6 of the commentary to Article 4 does recognize this in the following terms:

> "**In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of prime importance. The structure of the State and the function of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government**."

22. In the same vein in **Noble Ventures Inc. vs. Romania** (supra) it was held:

> "**Art. 4 2001 ILC Draft** (Article 4 of the ILC Articles) **lays down the well established rule that the conduct of any State organ, being understood as including any person or entity which has that status in accordance with the internal law of the State, shall be considered as an act of that State under**

international law. This rule concerns attribution of acts of so-called *de jure* organs which have been expressly entitled to act for the State within the limits of their competence. Since SOF and APAPS were legal entities separate from the Respondent, it is not possible to regard them as *de jure* organs."

23. In the instant case, Article 2 of Rwanda's *Law No. 10 of 2006 – Determining the Structure, Organisation and the Functioning of the City of Kigali* grants administrative and financial autonomy, as well as legal personality to the City of Kigali. Article 3 of the same law recognizes the division of Kigali City into districts. In turn, Article 6 of the same law grants administrative and financial autonomy, as well as legal personality to each district of Kigali City. On the other hand, this Court's understanding of Article 11 of *Law No. 28 of 2004 – Relating to Management of Abandoned Property* is that it provides for the establishment of Commissions responsible for the management of abandoned property 'at national level, in each province or the City of Kigali and in each district or town or municipality.' The Commission that is under scrutiny presently is the Kigali City Abandoned Property Management Commission that was set up under Article 11 of Law No. 28 of 2004 to undertake the management of abandoned property in Kigali City. No law was presented to us by the Applicant that expressly designates the Commission as an organ of the State of Rwanda as required by Article 4 of the ILC Articles or as was the case in the **Noble Ventures Inc.** case (supra). Consequently, the Commission cannot be deemed to be a *de jure* organ of the State of Rwanda neither can its actions be attributed to the said State on that account. We so hold.

24. The question then would be whether the Commission, though not a *de jure* organ of the State, was nonetheless empowered to exercise elements of governmental authority such as would render the Respondent culpable therefor under Article 5 of the ILC Articles or at all. For ease of reference Article 5 reads:

> "**The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance**."

25. A review of case law on Article 5 is instructive. In **Noble Ventures Inc. vs. Romania** (supra), SOF/ APAPS were held to have exercised elements of governmental authority because the Tribunal found no legal distinction between SOF/ APAPS on the one hand, and a governmental ministry on the other hand, when either entities had been expressly designated by the Romanian Privatisation Law as an empowered public institution for purposes of the country's privatization program. Thus both SOF and APAPS were found to have been clearly charged with representing the Romanian State in the privatization process.

26. In the earlier case of **Phillips Petroleum Co. Iran vs. Islamic Republic of Iran** (supra) the Iran-United States Claims Tribunal had given similar consideration to the express provisions of Iran's internal law in determining whether Iran was responsible for the expropriation of the claimant's goods when it allegedly took the said claimant's property interests through the National Iranian Oil Company (NIOC). The Tribunal observed:

> "**International law recognizes that a State may act through organs or entities not part of its formal structure. The**

conduct of such entities is considered an act of the State when undertaken in the governmental capacity granted to it under the internal law. …. The 1974 Petroleum Law of Iran explicitly vests in NIOC 'the exercise and ownership right of the Iranian nation on the Iranian Petroleum Resources."

27. On the other hand, in the more recent case of **Helnan International A/S vs. The Arab Republic of Egypt, Case No. ARB 05/19, 2006** an ICSID (International Centre for Settlement of Investment Disputes) Tribunal considered a challenge by the Respondent to the its jurisdiction on the ground that the actions of the Egyptian Company for Tourism and Hotels (EGOTH), the domestic entity whose acts were in issue in that case, were not attributable to Egypt given that, despite the entity having been within the ownership of the Egyptian Government', its administration allegedly remained independent of the Government. The Tribunal noted that the claimant had convincingly demonstrated that the entity in issue was 'under the close control of the State' in the following aspects:

a. **"The purpose of EGOTH is to 'contribute to the development of national economy in its field of activity and through its subsidiaries companies within the framework of the public policy of the State' (article 2.2 of the internal law);**
b. **EGOTH's memorandum and articles of association are reviewed by the State Council (article 11);**
c. **EGOTH's general assembly is headed by the Chairman of the Holding Company's board of directors. Moreover, the Minister exercises administrative and executive powers on the Holding Company;**
d. **Funds of EGOTH are public funds;**
e. **The Manager and Director of EGOTH may be imprisoned if he/ she does not distribute State's shares of profits (Article 49.3)".**

28. The Tribunal, nonetheless, held that all the elements of state control demonstrated above were not sufficient to conclude that EGOTH's conduct was attributable to Egypt, and cited with approval the following position by **Crawford, J, The International Law Commission's Articles on State Responsibility, 'Introduction, Text and Commentaries', Cambridge University Press, 2002, p.100**:

> **"The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity's conduct to the State. Instead, article 5** (of the ILC Articles) **refers to the true common feature, namely that these entities are *empowered*, if only to a limited extent or in a specific context, to exercise specific elements of governmental authority."** *(Emphasis ours)*

29. The Tribunal thus negated the structural form of an entity as a basis for determining whether it did, in fact, exercise elements of governmental authority; in preference for the core feature of Article 5, namely, the empowerment of such entity to exercise governmental authority. We do respectfully agree with that conclusion.

30. However, its foregoing findings notwithstanding, the Tribunal then went ahead to deduce EGOTH to have been 'an active operator in the privatization of the tourism industry on behalf of the Egyptian Government' and held:

> **"Even if EGOTH has not been officially empowered by law to exercise elements of governmental authority, its actions within the privatization process are attributable to the Egyptian State."**

31. With the greatest respect, this Court is not persuaded by this specific conclusion. In our judgment, Article 5 of the ILC Articles is couched in very clear and unambiguous terms. Empowerment by law is most clearly a pre-requisite to State responsibility under that Article. Indeed, paragraph 7 of the commentary to Article 5 aptly reinforces this position in the following terms:

> "**The formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority. This is to be distinguished from situations where an entity acts under the direction or control of the State, which are covered by article 8, and those where an entity or group seizes power in the absence of State organs but in situations where the exercise of governmental authority is called for: these are dealt with in article 9. … On the other hand, article 5 does not extend to cover, for example, situations where internal law authorizes or justifies certain conduct by way of self-help or self-defence; i.e. where it confers powers upon or authorizes conduct by citizens or residents generally. <u>The internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category</u>**." *(Our emphasis)*

32. The issue of empowerment is a question of fact that must be duly established. In the instant case, the internal laws of Rwanda are pivotal to a determination of whether or not the Kigali City Abandoned Property Management Commission was empowered to exercise a function that would otherwise have been a governmental function.

33. In that regard, Article 3 of Law No. 28 of 2004 explicitly demarcates the management of abandoned property as a function of the State. The Article reads:

> "**From the day of publication of this law in the official gazette of the Republic of Rwanda, any abandoned property shall be managed by the State until the return of the owners. In case of death of the owner without any legal heir, the property shall devolve to the State**."

34. On the other hand, Article 11 of the same law would appear to provide for Commissions to perform that function at national, provincial, city, district, town and municipality level. The Article is reproduced below:

> "**At the national level, in each Province or City of Kigali and in each District or Town or Municipality, there is hereby established a Commission to manage abandoned property without owners. ….**"

35. Meanwhile, Article 2 of Law No. 10 of 2006 reads:

> "**The City of Kigali is one of the administrative entities of the Republic of Rwanda and it is the Capital City of Rwanda. It has its own administration and a legal personality. It is autonomous in administration and finances**."

36. It is apparent, therefore, that whereas Article 11 of Law No. 28 of 2004 empowered the Kigali City Abandoned Property Management Commission to administratively serve Kigali City, Article 2 of Law No. 10 of 2006 grants the City distinct legal personality. Two salient issues emerge from the internal laws of Rwanda highlighted above. First, the management of abandoned property is a function of the State that has been devolved to different levels of local government in Rwanda. Secondly, although the Kigali City Abandoned Property

Management Commission is not a *de jure* organ of the Rwandan State within the precincts of Article 4 of the ILC Articles, it is an administrative unit of the local government entity known as the City of Kigali. To that extent, the instant case presents a hybrid of Articles 4 and 5 of the ILC Articles whereby the Commission was empowered to exercise governmental authority but was so empowered as an organ of the City of Kigali, a local government unit. It is manifestly clear that in so far as the Kigali City Abandoned Property Management Commission had been legally authorized to perform a function that was explicitly designated as a function of the State, it was empowered to exercise governmental authority within the precincts of Article 5 of the ILC Articles. Consequently, the Respondent would be responsible for the Commission's acts.

37. Having so found, it would follow that the decentralization of the governmental authority in question to provincial, regional and local government units would not negate the Respondent's responsibility for the Commission's conduct. We are fortified in this approach by the recognition that States that operate a decentralized form of governance vary widely in their structure and distribution of powers, and in most cases the constituent local government units have no separate international legal personality of their own. In the instant case, we have carefully scrutinized Law No. 10 of 2006, the objective of which is to determine '**the structure, organization and the functioning of the City of Kigali**.' *See Article 1 thereof*. Article 11 of that law details the mandate of the City of Kigali, essentially restricting it to Rwanda's national jurisdiction. There is no indication whatsoever in Law No. 10 of 2006 that the City of Kigali is granted international legal personality. Therefore, we find that the legal personality enjoyed by the City of Kigali under Law No. 10 of 2006 is restricted to Rwanda's internal legal regime.

38. In the result, we are satisfied that the Respondent's responsibility for the alleged misconduct of the Kigali City Abandoned Property Management Commission has been duly established before us. We do, therefore, find that the present Reference was properly instituted against the Respondent. Accordingly, this issue is resolved in the affirmative.

Issue No. 2: *Whether the Reference is time-barred and should be struck off the record.*

39. The Applicant faults the Commission for wrongfully taking over the management of UTC mall. This is reflected in paragraph 8 of the Reference. It is, therefore, that act of assuming management for the said mall that, in its view, gives rise to the cause of action before this Court. The Applicant contends that it discovered the alleged 'take-over' on 2nd October 2013 when one of its tenants brought to its attention a letter from the Commission ordering the tenants to pay their rental obligations to it and not the Applicant company. The letter in question was annexed to the Reference as Annexure G.

40. On the other hand, it is the Respondent's case that a decision for the Commission to take over the management of the shares of one Mr. Tribert Rujugiro in UTC was made in a meeting held on 29th July, 2013, therefore it was on that date that the present cause of action arose. The Minutes of the said meeting were not annexed either to the Reference or supporting affidavit, but were presented to this Court alongside the Respondent's written submissions.

Court's determination:

41. Article 30(2) of the Treaty provides for the time within which proceedings in this Court may be instituted. The Article reads as follows:

> "**The proceedings provided for in this Article shall be instituted within two months of the enactment, publication, directive, decision or action complained of, or in the absence thereof, of the day in which it came to the knowledge of the complainant, as the case may be.**"

42. Rule 39(1) of this Court's Rules of Procedure requires parties to proceedings before the Court to annex to their pleadings all the documentation that they intend to rely on in support of their claims. For ease of reference the Rule is reproduced below:

> "**There shall be annexed to the original of every pleading certified copies of any relevant document in support of the contentions contained in the pleading**."

43. On the other hand, Rule 41 of the same Rules enjoins parties to raise Preliminary Objections by pleading. It reads:

> "**(1) A party may by pleading raise any preliminary objection.**
> **(2) Where a respondent intends to raise a preliminary objection s/he shall, before the scheduling conference under Rule 53 of these Rules, give not less than seven (7) days' written notice of preliminary objection to the Court and to the other parties of the grounds of that objection.**"

44. For purposes of Preliminary Objections, therefore, the net effect of Rules 39(1) and 41(1) is that a Preliminary Objection should be pleaded in a Reference and all documentation in support thereof must be annexed to the Reference. In addition, a duty is placed upon a party that intends to raise a Preliminary Objection to serve

upon the Court and other parties to the proceedings written Notice of the grounds upon which the Objection is premised. *See Rule 41(2)*.

45. In the instant case, the Minutes that the Respondent now seeks to rely on were neither annexed to the Reference nor to the supporting affidavit. The Respondent could have furnished the said Minutes together with the Notice prescribed in Rule 41(2) but this, too, was not done. In the circumstances, the Respondent's attempt to rely on them at the stage of submissions is, in our considered view, misconceived. It seems quite clear to us that Rule 39(1) is couched in mandatory terms and must be complied with. The rationale behind that Rule is to avert trial by ambush. Parties must be furnished with sufficient material by way of pleadings to enable them effectively respond to matters in contention between them. This cardinal rule of legal process was well articulated in the case of **Captain Harry Gandy vs. Caspair Air Charter Ltd (1956) 23 EACA 139** as follows:

> "**The object of pleadings is of course to ensure that both parties shall know what are the points in issue between them so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent**."

46. We therefore find that the Minutes sought to be relied upon by the Respondent do not form part of the Court record and, consequently, shall not be relied upon by this Court in determining the issue of limitation of time. Accordingly, in the absence of any evidence to the contrary, we are satisfied that the Applicant got to know of the Commissions' assumption of the UTC mall's management on 2nd October 2013 vide a letter to that effect that was duly annexed to the Reference as Annexure G. Since the

Reference was filed on 22nd November 2013, it was clearly within the 2-month time frame prescribed by Article 30(2) of the Treaty.

47. We would therefore over-rule the Respondent's Objection on limitation of time, and do answer this issue in the negative.

Issue No. 3: *Whether the action of taking over the Applicant's mall by the Kigali City Abandoned Property Management Commission is inconsistent with and/ or in contravention of Articles 5, 6, 7 and 8 of the Treaty.*

48. It was submitted for the Applicant that in assuming management of the mall and redirecting rental payments to itself without giving the Applicant the opportunity to be heard, the Commission did not follow due process and thus contravened Article 5(2) of the Treaty that calls for the enhancement and strengthening of partnerships between the Respondent and the Rwandan private sector. The Applicant contended that the arbitrary take-over of the Applicant's property contravened the principles of good governance, rule of law, social justice and equal opportunities as enshrined in Article 6(d) of the Treaty. It was argued for the Applicant that the contravention of the foregoing principles also entailed breach of Articles 7(1)(a) and (2) of the Treaty. Finally, it was the Applicant's contention that the Respondent's arbitrary action defeated its undertakings to foster and promote the objectives of the Community or implementation of the Treaty as prescribed by Article 8(1)(a) and (c) of the Treaty. Learned Counsel for the Applicant cited this Court's definition of the notion of 'rule of law' in the case of **James Katabazi & 21 Others vs. The Attorney General of the Republic of Uganda Reference No. 1 of 2007**, as well as Article 14 of the African Charter on Human and Peoples' Rights and Article 17 of the Universal Declaration on Human Rights in support of his submission that the Respondent's arbitrary actions were a violation of the rule of law and the

Applicant's property rights. It was his contention that in so far as the EAC Treaty recognizes the human rights enshrined in the two Conventions, the Respondent's contravention thereof entailed an infringement of the provisions of the Treaty.

49. Conversely, it was the Respondent's submission that the Commission did not take over UTC as a company but only assumed the management of the shares therein held by Mr. Tribert Rujugiro. It was learned Respondent Counsel's submission that the assumption of the management of the shares was undertaken in accordance with Rwanda's Law No. 28 of 2004 and therefore was not a violation of the principles of the Treaty. Learned Counsel countered the Applicant's allegation of arbitrariness in the manner in which the Respondent's actions accrued, with the assertion that the Commission's action was undertaken with the knowledge of the Applicant as demonstrated by the Minutes of a meeting held on 29th July 2013. Finally, Counsel drew a distinction between the facts of **James Katabazi & 21 Others vs. The Attorney General of the Republic of Uganda** (supra) and the present case to the extent that no court order had been violated by the Respondent herein.

50. **Court's determination:**

We have carefully considered the pleadings, evidence and supporting documentation of both parties. The crux of the matter herein is whether the Commission's acts contravene Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1) of the Treaty. For ease of reference the cited Articles are reproduced below.

Article 5(3)(g)

For purposes set out in paragraph 1 of this Article and as subsequently provided in particular provisions of this Treaty, the Community shall ensure:

(g) the enhancing and strengthening of partnerships with the private sector and civil society in order to achieve sustainable socio-economic and political development.

<u>Article 6(d)</u>

The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:

(d) good governance including adherence to the principles of democracy, the rule of law, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

<u>Article 7(1)(a) and (2)</u>

(1) The principles that shall govern the practical achievement of the objectives of the Community shall include:

(a) people-centred and market-driven cooperation.

(2) The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.

<u>Article 8(1)</u>

The Partner States shall:

(a) Plan and direct their policies and resources with a view to creating conditions favourable for the development and achievement of the objectives of the Community and the implementation of the Treaty.

(b) Co-ordinate, through the institutions of the Community, their economic and other policies to the extent necessary to achieve the objectives of the Community, and

(c) ***Abstain from any measures likely to jeopardize the achievement of those objectives or the implementation of the provisions of this Treaty.***

51. We must reiterate from the onset our earlier finding that the Minutes of the meeting of 29th July 2013 are not on record and therefore cannot be relied upon by this Court. However, even if we were to make reference to them, they do relate to a decision to manage an individual shareholder's equity in the UTC mall rather than the assumption of the mall. Clearly there is contention between the Parties as to whether the Commission took over management of the UTC mall or simply assumed management of a shareholder's 'abandoned' equity therein.

52. Be that as it may, in the present Reference this Court is faced with the question as to whether actions allegedly undertaken in accordance with the internal law of a Partner State contravene the provisions of the Treaty. Rwandan internal law does provide for the management of abandoned property by the Commission. Whether, in fact, the Commission's actions were undertaken in compliance with Rwanda's internal laws is another matter. The material before this Court raises fundamental questions as to whether the 'property' in respect of which the Commission had assumed management had actually been abandoned so as to evoke the provisions of Law No. 28 of 2004, and whether the Applicant was given an opportunity to be heard prior to being deprived of the mall's management or, indeed, rental proceeds therefrom. The determination of those questions is critical to the ascertainment by this Court of the Respondent's compliance with Articles 6(d) and 7(2) of the Treaty. It seems to us that were those questions to be answered in the affirmative then there would be no breach by the Respondent of Articles 6(d) and 7(2) of the Treaty because due process that is inherent in the principles of

good governance, rule of law and social justice enshrined in these Articles would have been followed.

53. Perhaps more importantly, then, is the jurisdiction of this Court with regard to a domestic entity's compliance with the internal laws of Partner States or the lack thereof. Stated differently, this raises the question as to whether this Court can inquire into a domestic entity's compliance with the internal laws of a Partner State (or the lack of it). It is now well settled law that this Court's jurisdiction is restricted to the interpretation of Treaty provisions. *See Article 27(1) of the Treaty,* ***Attorney General of Kenya vs. The Independent Medical Legal Unit EACJ Appeal No. 1 of 2011*** *and* ***Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda EACJ Ref. No. 5 of 2011***. Conversely, the proviso to Article 27 does recognize the jurisdiction of organs of the Partner States.

54. That is not to say that this Court cannot intervene where it has been established before it that a Partner State has acted in breach of its own internal laws. On the contrary, this Court has held that such a Partner State would be in contravention of Articles 6(d) and 7(2) of the Treaty to the extent that it has violated the principles of good governance and rule of law. Indeed in the case of **Samuel Mukira Muhochi vs The Attorney General of the Republic of Uganda** (supra) this Court did rule that to the extent that section 3(1) of Uganda's East African Community Act, 2002 domesticated and adopted the Treaty into the laws of Uganda, a breach of Treaty provisions would amount to a breach of the internal laws of Uganda. It was the Court's finding that in declaring the Applicant therein a prohibited immigrant, Uganda had failed to follow its immigration laws and thus breached Articles 6(d) and 7(2) of the Treaty. However, the circumstances pertaining to the present Reference are distinctly different from those in the **Samuel Mukira Muhochi** case. In that case the Applicants therein challenged the provisions of the law

under which the acts complained of had ensued. That is not the case presently; Law No.28 of 2004 is not in issue before us.

55. This Court is enjoined to restrict itself to the jurisdiction conferred upon it under Article 27(1) and acknowledge the jurisdiction of national courts as delineated in the proviso to Article 27(1). The restriction of this Court's jurisdiction to the interpretation of the Treaty would defer legal disputes that fall outside that ambit to the jurisdiction of national courts or other related bodies. Accordingly, we find that the question as to whether or not the Respondent's actions were in compliance with Rwanda's internal laws is not a matter of Treaty interpretation and is therefore not an issue for determination by this Court.

56. On the other hand, the Applicant faults the Commission for engaging in acts contrary to Articles 5(3)(g) and 8(1)(a) and (c) of the Treaty. A plain reading of those Treaty provisions reveals that they highlight parameters that are intended to facilitate the crystallization of the Community's objectives as outlined in Article 5(1) of the Treaty, as well as the implementation of the Treaty. The Applicant faults the Commission for engaging in acts contrary to those parameters. With respect, we are unable to agree with the Applicant. We find that Articles 5(3)(g) and 8(1)(a) pertain to Rwandan national policy which is not in issue before this court. What is in issue here is the conduct of the Commission.

57. Unlike Articles 5(3)(g) and 8(1)(a), however, Article 8(1)(c) pertains to any 'measures' undertaken by Partner States which are likely to jeopardize the realization of the objectives of the Community or implementation of the Treaty. This would extend beyond policies to include the Commission's actions that are presently under scrutiny and, indeed, the law on abandoned property itself. However, first, we have already found that the actions in question

have not been proven to have contravened Rwanda's internal laws neither does this Court have jurisdiction to determine that issue. Therefore, we are unable to draw a conclusion that due process has been violated or the principles enshrined in Articles 6(d) and 7(2) have been breached. Secondly, although Law No. 28 of 2004 under which the acts complained of were undertaken may be deemed to be a 'measure' for purposes of Article 8(1)(c) and would therefore be open to scrutiny by this Court, that law was never in issue in the present Reference. At the risk of repeating ourselves, only the Commission's actions as implemented thereunder were in issue herein.

58. In the result, we find that the Applicant has not established a Treaty violation attributable to the Respondent. We so hold.

Issue No. 4: *Whether the parties are entitled to the remedies sought.*

59. The Applicant sought the following prayers and orders against the Respondent :

a. A declaration that the actions of the Respondent in taking over the Applicant's property contravened Articles 5(3)(g), 6(d), 7(1)(a) and (2), and 8(1)(a), (b) and (c) of the Treaty ;

b. An Order that the Respondent be restrained from further interference with the business and management of the Applicant's property ;

c. An Order that the Respondent pays general damages to the Applicant and costs of and incidental to this Reference be met by the Respondent.

d. That this Court be pleased to make such further or other Orders as may be just and necessary in the circumstances.

60. Having found that the Applicant has not established a violation of the Treaty that is attributable to the Respondent, we decline to grant the Declaration sought in paragraph (a) above. Accordingly, the Applicant is not entitled to the restraining Order sought under paragraph (b) or to general damages as claimed

under paragraph (c) above. We do, therefore, decline to grant the said Orders.

61. With regard to the prayer in paragraph (c), it is a well established rule of procedure that costs should follow the event. However, we are also mindful of exceptions to this rule in exceptinal circumstances. Hence in **Sutherland vs. Canada (Attorney General) 2008 BCCA 27** (CanLii) the Supreme Court of British Columbia held that courts should not depart from this rule except in special circumstances, as a successful litigant has a 'reasonable expectation' of obtaining an order for costs.

62. In **Barclay (Guardian *ad litem*) vs. British Columbia 2006 BCCA 434** (CanLii) matters of public interest were identified as exceptions to the general rule. It was held (per Mackenzie JA):

> "**The strictures of the general rules in private litigation are modified to some degree in litigation which engages a broader public interest beyond the pecuniary interests of the particular plaintiffs who pursue the action.**"

63. Similarly, in **British Columbia (Minister of Forests) v. Okanagan Indian Band 2003 SCC 71** (CanLii) Lebel J. stated:

> "**In highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequences of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party.**"

64. In the instant case, the Reference largely gravitated around issues of State responsibility for the conduct of decentralised or devolved governance entities. Those issues are of great importance to the Community and Partner States, and have not previously been adjudicated before this Court.

Conclusion

65. In the final result, we do hereby dismiss the Reference and order each Party to bear its own costs. It is so ordered.

Dated and delivered at Arusha this **27th** day of **November, 2014**.

HON. JUSTICE JEAN BOSCO BUTASI

PRINCIPAL JUDGE

HON. JUSTICE ISAAC LENAOLA

DEPUTY PRINCIPAL JUDGE

HON. DR. JUSTICE FAUSTIN NTEZILYAYO

JUDGE

HON. LADY JUSTICE MONICA K. MUGENYI

JUDGE

HON. JUSTICE FAKIHI A. JUNDU

JUDGE