IN THE EAST AFRICAN COURT OF JUSTICE

APPELLATE DIVISION AT ARUSHA

(Coram: Liboire Nkurunziza, V P; James Ogoola J A, & Aaron Ringera J A)

APPEAL NO. 2 OF 2013

(***Appeal from the Judgment of the First Instance Division [Justice Businge, PJ; Lady Justice Arach-Amoko,DPJ; Justice Mkwawa, Justice Butasi and Justice Lenaola], in Reference No. 1 of 2012 dated 17th May 2013)***

BETWEEN

TIMOTHY ALVIN KAHOHO ……APPELLANT

AND

THE SECRETARY GENERAL OF

THE EAST AFRICAN COMMUNITY ……..RESPONDENT

JUDGMENT

I INTRODUCTION

1. This appeal is the culmination of a spectacular odyssey by a public-spirited citizen of the East African Community who, single-handedly, dedicated himself, his time and his personal resources to the elusive pursuit of justice for all. Against all odds, the Appellant, Mr. Timothy Kahoho, a single individual in this Community of Five Partner States and more than 150 Million People, set out to challenge the Directives of the Summit of the Five Heads of State concerning the route and the direction through which the desired East African Political Federation should travel; the pace at which that travel should proceed; and the nature and depth of involvement which the collective Citizenry of East Africa should be afforded in forging the enterprise of that Political Federation.

2. In the Appellant's own words: "*This is a landmark suit whereby an ordinary citizen of an expected East African Federation is challenging decisions of the Summit [of Five Heads of State]*"" on the process of attaining that Federation. In essence, the case raises the fundamental issues of the separation of powers between the different Organs of the East African Community; the appropriate margin of appreciation to be accorded to the Summit's exercise of its sovereign power to steward the Community to achieve its ultimate objectives (particularly so the establishment of a

Political Federation); and the role of the People of East Africa in forging the destiny of their Community.

3. It was for these reasons that Mr. Kahoho (now "the Appellant"), was inspired to file a Reference in this Court, to contest the Summit's directives to the Secretariat of the Community for studies on the envisaged Federation. He lost the skirmish. Dissatisfied with the judgment of the First Instance Division of this Court, Mr. Kahoho filed this Appeal in this Appellate Division:

1) seeking to quash the decision and judgment of the First Instance Division, dated 17th May 2013; and
2) praying for an award of appropriate reliefs, including personal damages.

4. In his Memorandum of Appeal, the Appellant set out a litany of his grounds of appeal – which, for reasons of brevity and clarity, may be summarized as follows – namely, that the First Instance Division erred:

1) in holding that decisions of the 13th EAC Summit held in Bujumbura, Burundi, did not breach Articles 73, 138 and 151 of the EAC Treaty;
2) in determining the first issue (above) without taking into account the Appellant's argument that Articles 73 and 138 of the EAC Treaty were

not "*areas of co-operation*" envisaged under Article 151 of that Treaty;

3) in delivering its verdict without considering the Appellant's submission that the Respondent failed to address paragraph 11 of the Reference;
4) in holding that directives of the 13th EAC Summit in Bujumbura did not infringe Articles 6, 7 and 123 (6) of the EAC Treaty (despite Article 11 (5) of the Treaty which does not empower the Summit to give directives to the EAC Secretariat);
5) in finding for the Respondent without considering those of the Appellant's pleadings which the Respondent, in their pleadings, did not specifically deny;
6) in committing judicial irregularities through deliberating upon and determining the third issue by reference to a book entitled "**The State of East Africa: Report, 2006**" in respect of the 13th Summit's act of mandating the Secretariat to perform the functions set out in paragraph 10 (iii) of that Summit's Communiqué dated 30th November, 2011;
7) in holding that no error was rectified by the 14th EAC Summit when it assigned the impugned directives to the Partner States and directed the Council of Ministers to report back to the 15th EAC Summit;

8) in interpreting Article 131 of the EAC Treaty too broadly, to widen the scope of the Partner States' areas of co-operation; and

9) in exceeding its judicial powers and basing its decision on wrong premises.

II BACKGROUND

5.The brief but succinct background to this Appeal is set out in paragraph 2 of the Judgment dated 17th May 2013 of the First Instance Division in the underlying Reference to this Appeal. That paragraph recounts the factual background to the Reference, as follows:

> **THAT** on 30th November, 2011, the EAC Summit issued, its Communiqué after its meeting in Bujumbura, Burundi (the "Bujumbura Communiqué").
>
> **THAT** the Communiqué:

- Approved the Protocol on Immunities and Privileges for the East African Community; including its organs and institutions;
- Considered and Adopted the Report of the Team of Experts on fears, concerns, and challenges on the Political Federation;

- Noted the Recommendations of the Team of Experts for addressing those fears, concerns and challenges;
- in its Paragraph 10, mandated the Secretariat to:-

I. Produce a Road map for establishing and strengthening the institutions identified by the Team of Experts as critical to the functioning of the Customs Union, the Common Market, and the Monetary Union.

II. Formulate an action plan for operationalizing the other recommendations in the Report of the Team of Experts.

III. Propose an Action Plan, and a Draft Model of the structure of the East African Federation for consideration by the Summit at its 14th Ordinary Meeting.

6. In its Judgment, the First Instance Division considered and rejected all the five issues which were agreed for trial. Those issues were as follows:

1) Whether the decision of the 13th Summit approving the Protocol on Immunities and Privileges contravened Articles 73, 138 and 151 of the Treaty?

2) Whether the decision of the 13th Summit to mandate the Secretariat to undertake the functions stated in paragraph 10 of

the Bujumbura Communiqué of 30th November 2011, contravened Articles 6, 7 and 123 (6) of the Treaty?

3) Whether the process towards the establishment of a Political Federation of the East African Partner States is an exclusive preserve of the Council of Ministers, to which the Secretariat cannot contribute?

4) Whether the conclusion of Protocols is permissible only where the East African Community Treaty specifically provides for 'areas of co-operation'?

5) Whether the Applicant (now "Appellant") was entitled to the reliefs sought?

7. Having lost his case on every issue, the Applicant in the Reference appealed to this Division of the Court against the whole Judgment of the First Instance Division, seeking the following remedies:

1) A declaration that the 13th Summit, in its Bujumbura Communiqué, grossly breached the Treaty; in particular Articles 6, 7 and 123 (6) of the Treaty.

2) A declaration that the same Summit infringed the provisions of Articles 73 and 138 of the Treaty.

3) An order requiring all subsequent Summits to abide by the provisions of Article 123 (6) of the Treaty.
4) A declaration that all actions that the Secretariat may have implemented pursuant to the impugned Directives of the 13th Summit are null and void.

8. At the Scheduling Conference of the appeal before this Appellate Division, the Parties consolidated the above grounds into the following four issues, namely:

1) Whether the First Instance Division erred in deciding that the directives of the 13th Summit were consistent with Articles 6, 7, 11, 73, 123(6), 131, 138 and 151 of the Treaty?
2) Whether the First Instance Division, in addressing the question of the impugned directives issued by the 13th Summit to the Secretariat, committed any judicial irregularities?
3) Whether the First Instance Division, in reaching its Judgment, failed to consider the arguments of the Applicant (now "Appellant") in paragraphs 7, 8, 9 and 11 of his Reference?
4) Whether the Appellant is entitled to the remedies sought?

III THE APPELLANT'S CASE

9. In the main, the Appellant in his written and oral submissions on the above agreed issues, adopted wholesale the submissions, arguments and contentions that he had previously made before the First Instance Division. However, he did highlight a number of areas specific to this appeal – for instance, regarding the exercise of discretion by the Learned Judges of the First Instance Division.

IV THE RESPONDENT'S RESPONSE

10. The Respondent denied all the contentions raised by the Appellant. In particular, the Respondent maintained that the First Instance Division:

1) correctly decided that the directives of the 13th Summit were consistent with Articles 6, 7, 11, 73, 123 (6), 131, 138 and 151 of the Treaty;
2) did not commit any judicial irregularities when considering the above question of the directives issued by the 13th Summit to the Secretariat; and
3) considered all the arguments adduced in the Applicant's pleadings (including the arguments in paragraphs 7, 8, 9 and 11 of the Reference).

IV ANALYSIS OF THE ISSUES

11. We analyse below the four Agreed Issues:

Issue No. 1: Whether the First Instance Division wrongly decided that the Directives of the 13th Summit were consistent with Articles 6, 7, 11, 73, 123(6), 131, 138 and 151 of the Treaty?

12. Wrapped under one common cloak in this Issue, were two distinct limbs of the same Issue – namely:

1) Whether the Summit's adoption of a Protocol on Immunities and Privileges was consistent with Articles 73 and 138 of the Treaty? and
2) Whether the Directives the Summit issued to the Secretariat to undertake the Political Federation functions listed in paragraph 10 of that Summit's Bujumbura Communiqué, were in breach of Articles 6, 7, 11 and 123 (6) of the Treaty?

13. As regards the first limb of the Issue of that Summit's Communiqué of 30th November, 2011 (concerning the adoption of the Protocol on Immunities and Privileges), the Appellant maintained his earlier contentions, namely that the Summit lacked authority to adopt that draft Protocol, as the contents and subject matter of the Protocol were not

"areas of co-operation" within the meaning of Articles 73, 138 and 151 of the Treaty. To the extent that the Appellant merely repeated before this Court, the same submissions that he had made before the First Instance Division, there was an element of confusion as to whether he was now seeking a "review", a "revision" or an "appeal".

14. Be that as it may, we nonetheless decided to treat the matter as being an appeal. We did so for two reasons. First, the Appellant was throughout this litigation an unrepresented litigant, whom the Court – especially a Court of Justice, such as ours – should not overly penalize for not knowing the intricacies and technicalities of the law's demands. Secondly, the point raised by the Appellant was an important one, requiring close scrutiny of the nature and architecture of the EAC Treaty.

15. The Judgment of the First Instance Division dealt with the sub-issue of the Immunities Protocol at two levels. First, the Learned Judges reasoned that the Protocol, in its language, structure and content was in line with the harmonization, function, development and furtherance of the objectives of the Community and the implementation of the provisions of the Treaty…as can be discerned from a good faith reading of Articles 73, 131 and 138 of the Treaty (see paragraphs 61-67 of this Judgment).

16. Second, they concluded that the required "*areas of co-operation*" are not confined to those specifically listed or enumerated in the Treaty. Article 138 can create an area of co-operation around which the Protocol can properly be concluded under Article 151 of the Treaty. Indeed, it is for this purpose that Article 131 was enacted to reduce frequent amendments of the Treaty that would necessarily be required whenever a new area of co-operation arose and which could not otherwise be managed outside the existing provisions of the Treaty.

17. Upon careful reflection, we cannot fault the learned Judges' above reasoning and holding, concerning this sub-issue of the Protocol on Immunities and Privileges. We agree with their Lordships' position. We would, however, add one or two other reasons why the Summit's adoption of that Protocol did not contravene the Treaty. For one, Article 1 of the Treaty defines the concept of **co-operation** in terms that reinforce (rather than detract from) the propriety of the impugned Protocol. That Article defines "co-operation" as follows:-

> "*co-operation includes the undertaking by the Partner States in common, jointly or in concert, of activities undertaken in furtherance of the objectives of the Community as provided for under this Treaty*

or under any contract or agreement made thereunder or in relation to the objectives of the Community;"

18. It is quite evident from the above definition that co-operation between the Partner States is neither confined nor restricted exclusively to the areas of co-operation that are specifically enumerated in the present provisions of the Treaty. Pursuant to Article 1 of the Treaty, the Partner States may – whether "*in common", or "jointly", or "in concert*" – undertake any co-operative activity that they set their sovereign mind to. Such activity may be in any field of endeavor – whether within or outside the vast and varied fields of co-operation that are specifically referred to in the Treaty.

19.In this regard, the terrain and the scope of the "areas of co-operation" specifically enumerated in the Treaty is enormous, nay, colossal – ranging, as they do, from co-operation in Trade Liberalization and Development (Chapter 11); to co-operation in Investment and Industrial Development (Chapter 12); to co-operation in Standardization, Quality Assurance, Metrology and Testing (Chapter 13); Monetary and Financial Co-operation (Chapter 14); Co-operation in Infrastructure and Services (Chapter 15); Co-operation in Development of Human Resources, Science and Technology (Chapter 16); Free Movement of Persons, Labour, Services, Right of Establishment and Residence (Chapter 17); Agriculture and Food Security

(Chapter 18); Environment and Natural Resources Management (Chapter 19); Tourism and Wildlife Management (Chapter 20); Health, Social and Cultural Activities (Chapter 21); Enhancing the Role of Women in Socio-Economic Development (Chapter 22); Co-operation in Political Matters (Chapter 23); Legal and Judicial Affairs (Chapter 24); the Private Sector and the Civil Society (Chapter 25); Relations with Other Regional and International Organisations and Development Partners (Chapter 26) and Co-operation in Other Fields(Chapter 27).

20. The above list is, to say the least, expansive, extensive and exhaustive, if not exhausting. In our view, the sheer vastness of the scale and breadth of these far-flung areas of co-operation is trite testimony to the intent of the framers of the Treaty to prescribe co-operation that is all-encompassing and all-consuming. From it, it is difficult to see or imagine any other "*areas of co-operation*" that would not fit in the many diverse and broad areas listed in the above Chapters 11 to 26 of the Treaty.

21. But just in case any particular field or sector of co-operation was not catered for under Chapters 11 through 26, the framers of the Treaty left nothing to chance. They specifically included a residual Chapter – of only one Article: Article 131 – to capture "**Co-operation in [all] Other Fields."**

Given all the above, we find that:

1) the areas of co-operation expressly listed as such in the Treaty, are both numerous enough and sufficiently broad to accommodate virtually any area of co-operative endeavor that the Partner States may choose to entertain; and
2) there is a residual, catch-all chapter in the Treaty for any other co-operation outside the fields that are expressly enumerated in Chapters 11 through 26 of the Treaty. Under this residual chapter, Partner States may seek to co-operate in any field whatsoever that they may choose – as long as such co-operation meets the critical condition set out in Article 1 (definition) of the Treaty: namely, that the co-operation is **"in furtherance of the objectives of the Community…";** as well as the core requirement in Article 151 (1) that the co-operation must spell out the "objectives and scope of, and institutional mechanisms for such co-operation and integration".

23. The above references in both Article 1(1) and Article 151 (1) of the Treaty to the furtherance and promotion of "the objectives of the Community", are a recurrent theme throughout all the relevant provisions of the Treaty on co-operation. That theme is a pivotal pre-requisite whenever

and wherever co-operation between the Partner States is envisaged. It is repeated over and over again in Article 1(1), 74, 79, 82(1), 89, 102(1), 115(1),117, 123(1) and (4), 124(1), 126(1), 130(3) and 151(1) of the Treaty.

24. From this categorical emphasis, it is quite evident, in our view, that both the spirit and letter of the Treaty (read as a whole), is to permit the Partner States to forge co-operation of any kind, in any field, and on any matter of their choice – whether within or outside the ambit of the enumerated "areas of co-operation" – as long as that co-operation is in the furtherance or promotion of the objectives of the Community as set out in Article 5 of the Treaty.

25. Accordingly, in any given co-operative endeavor between the Partner States, the question to ask is not: whether the endeavor falls within the "areas of co-operation" specifically enumerated in the various provisions of the Treaty. The question, rather, is: whether the particular area of endeavor is in the furtherance or promotion of the objectives of the Treaty, set out in Article 5 thereof.

26. In the instant case, there can be no doubt whatsoever, but that the proposed Protocol for the Partner States' recognition of the Immunities and Privileges of the Community (and its organs, institutions and employees)

would, indeed, promote the objectives of the Community. Therefore, far from being an infringement of the Treaty, the Summit's adoption of the Protocol was, indeed, an enhancement of the objectives and purposes of the Treaty.

27. In addition to the above express Chapters of the Treaty on co-operation, there are other provisions under which Partner States may undertake other co-operative endeavors of their own choice. Two examples of such provisions will suffice. The first, is Article 123 (4) which mandates Partner States to pursue a common foreign and security policy through co-operation in any matter of foreign or security interest, and by co-ordinated international action of the Partner States.

28. The second example is Article 138, under which Partner States may co-operate in pursuit of implementing, harmonizing, coordinating or streamlining their joint positions on matters of the Status of Immunities and Privileges to be accorded to the East African Community and its officers.

29. The Protocol on Immunities and Privileges for the East African Community and its Organs and Institutions, is meant to create a common platform to enable Partner States to coherently and uniformly implement Articles 73 and 138 of the Treaty, read together with Article 151.

Principally, the Protocol seeks to establish a common framework to guide the status of immunities and privileges in the various Host Agreements hitherto signed piecemeal by the Secretary General and the Governments of Partner States pursuant to Article 138(2).

In this regard, we find that Articles 73 and 138 of the Treaty do not prohibit the conclusion of the proposed Protocol on Immunities and Privileges -- which is crucial to inform the Community's employment terms and conditions, amongst other objectives. Moreover, the Protocol is intended to provide standard guidelines that uniformly cater for the protection and interests of the Community and of its Organs, Institutions, and Employees – on matters of the immunities and privileges to be granted; and, thereby, to facilitate the various beneficiaries in the execution of their Treaty mandate.

30. From all this, it is plainly evident that in adopting the proposed Protocol on Immunities and Privileges, the 13th Summit committed no breach of any Treaty provision at all, and, most especially Articles 73 and 138. On the contrary, the Summit had a formidable bulwark of Treaty provisions to stand on.

31. Accordingly, the Appellant fails on the first sub-issue of Issue No.1.

32. The second sub-issue of Issue No.1 was this: **Whether the Directives issued by the 13th Summit to the Secretariat to undertake the Political Federation functions under paragraph 10 of that Summit's Communiqué of 30th November 2011, were in breach of Articles 6, 7, and 123 (6) of the Treaty?**

33. The Appellant's bone of contention on this sub-issue (reduced to its barest skeletal minimum), was simply this: the Summit had no authority in the Treaty to direct the **Secretariat** to undertake these Political Federation functions. In the Appellant's view, the Summit could, and should, have given those directives either to (i) a member of the Summit, or to (ii) the Council of Ministers, or to (iii) the Secretary General under Article 11(5) – but not the **Secretariat.**

34. Delegation of Authority: Article 11(5) Vs Giving Directives: Article 11(1).

Article 11 of the Treaty addresses two quite separate and distinct notions. First, the notion of the Summit's authority to **issue directives** for the performance of particular operations of the Community; and, second, the notion of the Summit's authority to **delegate its authority** to named organs or persons in the Community.

35. The first notion (issuing directives) is contained in Article 11 (1). Under it, the Summit has authority to:

> "1…*give general directions and impetus as to the development and achievement of the objectives of the Community."*

Most important in the above-quoted language, Article 11 (1) is expressed as a general principle.

36. The Summit is not restricted, or in any way fettered, as to how, when, and to whom it is to give its directives. Least of all, the sub-Article does not constrain, restrict or draw any boundaries around the kind of organs, institutions, officers or other persons to whom the Summit may address its directives. It is not even stated whether such recipients of the Summit's directives are limited only to persons "within" the Community – or whether even those "outside" the Community are envisaged.

37. In other words, the Summit is totally free to choose to whom it may address its directives – so long as those directives concern "the development and achievement of the objectives of the Community." Article 11(9) makes this function of the Summit non-delegable.

38. The position with regard to the second notion (.i.e. delegation of authority), however, is vastly different. It is contained in Article 11(5) of the Treaty. Unlike its counterpart (Article 11(1) discussed above), this sub-Article (5) deals with the more substantive matter of transferring authority from one Organ of the Community (the Summit), to other organs and persons.

39. First, and foremost, the nature and character of a formal delegation of authority is totally different from the administrative act of issuing directives to somebody to carry out a task or a function. Delegation involves transfer of authority from one person (the delegator) to another (the delegatee). In this connection, **Black's Law Dictionary, 8th Edition at p.459** defines delegation as:

> *"the act of entrusting another with authority or empowering another to act as an agent or representative."*

40. From the effective time of the delegation, the delegatee/agent becomes clothed with the scope of authority so delegated. The delegate enjoys the authority formerly enjoyed by the delegator. Secondly, in accordance with the terms of Article 11(5), the delegation of the Summit's authority is strictly circumscribed as to whom the power may be delegated – namely, a

member of the Summit, the Council of Ministers, or the Secretary General. No other potential delegatee's are allowed (e.g. the Secretariat, the East African Court of Justice, the East African Legislative Assembly, etc.) – let alone those outside the family of the East African Community.

41. Moreover, the scope of what authority of the Summit is delegable under Article 11(5), is equally restricted – by Article 11(9), which prohibits the delegation of the following powers of the Summit:

> *"(a) the giving of general directions and impetus;*
>
> *(b) the appointment of Judges of the East African Court of Justice*
>
> *(c) the admission of new Members and granting of Observer Status to foreign countries; and*
>
> *(d) assent to Bills."*

42. Paragraph 10 of the Bujumbura Communiqué did not in any way constitute a delegation (i.e. **transfer)** of any of the powers or authority of the Summit under the Treaty. Conversely, the Secretariat did not, thereby, assume the exercise of any of the powers or authority of the Summit.
All that the Summit transmitted and the Secretariat received were a set of directives instructing the Secretariat to perform certain activities and preparatory assignments on the question of Political Federation. At the conclusion of the exercise, the Secretariat was required to make "proposals

and recommendations" for the consideration of the next Summit. Thus, in whichever way, and from whatever angle the matter is looked at, the issuance of the Summit's directives was not an act of delegation of power or authority within the meaning of Article 11(5) of the Treaty.

43. Therefore, in view of the separate and distinct functions of Article 11 (1), on the one hand; and Article 11(5) on the other, the Appellant's complaint concerning the organ to whom the directives of the Summit in paragraph 10 of the Bujumbura Communiqué was addressed, was misconceived. It is quite evident from the above analysis, that the Summit could not and was not "**delegating**" its directives to anybody. Rather, it was transmitting a set of its decisions to the Secretariat for the latter's implementation. Clearly, this was appropriate, and unimpeachable - in as much as the Secretariat is, indeed, the executive organ of the Community, with express authority and responsibility for the "**implementation of the decisions of the Summit**" - see Article 71(1) (l).

44. The above should put to rest the Appellant's misconceived contention that the Summit should have addressed its directives to the Secretary General (not the Secretariat).

45. In any event and given the above analysis, it matters not whether the Summit addresses its directives to the Secretariat or to the Secretary General. The two are but two faces of the same coin. The Secretary General is the Head of the Secretariat: Article 67(3). He or she is the very embodiment of the Community which, as a corporate body, is represented by the Secretary General: [(Article 4(3).

46. The Secretariat (its Officers, Staff and Employees), exists to assist its Head, the Secretary General, to execute his or her mandate under the Treaty. Indeed, Article 71(2) is emphatic—the Secretary General "*shall where he or she thinks appropriate, act on behalf of the Secretariat."* In our view, therefore, it matters not whether the impugned directives of the 13th Summit were addressed to the Secretariat or to the Secretary General. To make a contention about this is to make a mountain out of a mole hill. It is to brew a storm and to stir a tsunami out of a plain tea cup.

47. Regarding the Appellant's contention that the initiation of the process of Political Federation can only be done by the Summit directing the Council of Ministers under Article 123(6), we agree with the judgment of the First Instance Division which (after a very comprehensive review of the facts and all the materials before it), found the contention to be misguided because:
"*the initiation of the process of Political Integration and eventual Political Federation was not made at the 13th Summit, but much earlier [and] therefore, the mandate given to the Secretariat was in furtherance of a process that had been in place long before the Bujumbura Communiqué*.
….
In fact in its Report dated 26th November 2004 presented to the Summit, the Committee on Fast Tracking East African Federation, in its transmittal letter to the Heads of State, acknowledged that the Summit in fact initiated the process in its Communiqué of the 28th August 2004 and not later. These facts cannot be contested because they have been well documented for posterity". **See paragraphs 43, 52 and 53 of the judgment of the First Instance Division**.

48. Additionally, as discussed elsewhere in this Judgment, we find the contention of the Appellant to be inconsistent with the well-established principles of Treaty interpretation to the effect that a Treaty should be interpreted holistically and purposively. In this connection, Article 123(6) must not be read selectively or in isolation. It must be read together with other Articles of the Treaty. Indeed, in the instant case, the whole Article 123 must be read with Articles 11, 14 and 71 of the Treaty. These Articles are complementary. Read as a whole, they lead us to the conclusion that even if the Appellant's contention that the process of Political Federation was initiated by the 13th Summit in Bujumbura (which we do not accept), the Summit did not exceed its authority. The Summit is the driver of the engine of the locomotive of East African Integration and Political Federation.

49. In the result, the Appellant fails as well on this second sub-issue of Issue No. 1.

50. Issue No. 2: Whether the First Instance Division committed judicial irregularities when addressing the question of the Summit's directives to the Secretariat?

As we understood it, the crux of the Appellant's contention was that the First Instance Division distorted his arguments; lacked neutrality (i.e. favoured the Respondent's positions); and showed ill-will, rather than "good faith" in interpreting Articles 6, 7, 73, 123 (6), and 138 of the Treaty

contrary to the hallowed principles of the Vienna Convention on the Law of Treaties.

51. As a general proposition, it was up to the Appellant to satisfy the Court of the veracity of his allegations. The general rule on this – which is widely accepted and applied in virtually the entire World's major jurisdictions and systems of law – is that the onus to prove allegations made, is on the person making them. That rule is oftentimes summarized as: *"He who asserts, must prove."* Indeed, in the practice of similar international courts (such as the Court of Justice of the European Union), that rule is duly recognised:

52. Likewise, in the International Court of Justice ("ICJ"), the position has been articulated as follows:

> "*In contentious cases, the Court has indicated that judgment on the merits would be limited to upholding such submissions of the parties as have been supported by sufficient proof of relevant facts and are regarded by the Court as sound in law*." – see SHABTAI ROSSENE: **The Law and Practice of the International Court [of Justice] 1920 – 2005 Fourth Edition, Vol. III, Procedure (Martinus Nijhoff Publishers), III. 256 at p.1036.**

53. Thus, the ICJ rule is quite evident. It is the litigant who is seeking to establish a fact, who bears the burden of proving it – see the cases of **Military and Paramilitary Activities in and Against Nicaragua (Jurisdiction and Admissibility Case**, **[1984] 392, 437 (para 101);** and **Land and Maritime Boundary between Cameroon and Nigeria Case, [2002] 303, 453 (para 321).**

54. In paragraph 3.03 of his written submission (dated 12th February, 2013), the Appellant alleged *"distortion of my arguments…for the sake of favouring the Respondent".*

55. In the instant case, the Appellant needed to do two things. First, and fundamentally, he needed to provide all the meat, necessary to cover the mere skeletal bones of his various allegations. For instance, he needed to provide the detailed particulars and substance of how and where the first Instance Division:

- "distorted" his arguments;
- lacked "neutrality" (or, more accurately, "impartiality") vis-à-vis the two Parties;
- showed "favoritism" for the Respondent, and "bias" or prejudice against the Appellant;
- interpreted the Treaty with "ill-will" (i.e. without "good faith");

On the whole, the Appellant fell short of providing succinct and precise particulars of his diverse allegations.

56. Secondly, the Appellant needed to prove each and every particular of his allegation. In this, again, he fell short. The most he could attain to were generalized statements of allegations – without supporting proof.

57. In paragraph 3.03 of his written submission (dated 12th February 2013), the Appellant alleged "distortion" of his arguments…for the sake of favoring the Respondent". We found no "distortion" in the First Instance Divisions' assessment of the Appellant's (the then Applicant's) submissions. True, the Court did prefer the Respondent's position on some issues (as against the position of the Appellant). However, to prefer one side of the Parties' arguments, is every Court's usual and expected duty: a duty which oftentimes requires the Court to carry its professional cross – in as much as the losing Party (as is evident in the instant case) is likely to cry foul, for no reason at all, other than the loss of that Party's argument.

58. Similarly, in paragraphs 3.04 – 3.08 of his written submissions, the Appellant alleges "ill-will" in the First Instance Division's interpretation of the Treaty. By "ill-will", the Appellant most probably meant "bias" (i.e. animosity, prejudice, and bad or evil intentions). The Appellant's reasoning on this issue was rather circular. He argued, for instance, that "*the Court committed an irregularity by committing excessive irregularities*."

59. In effect, the Appellant (in paragraph 3.07); contended that the First Instance Division *"utilized excessive judicial irregularities in determining Issues No. 1, 2, 3 and 4… with intent of favouring the Respondent".* Be that as it may, failure to interpret the Treaty, or to interpret it erroneously, does not constitute a procedural *irregularity.* An irregularity is a procedural shortcoming; not a substantive error of interpretation of the law.

60. We find no bias or favouritism on the part of the First Instance Division's interpretation of Articles 6, 7, 73, 123(6) and 138 of the Treaty. On the contrary, the Court (as expressly quoted by the Appellant himself) did cite Article 31 (1) of the Vienna Convention on the Law of Treaties – namely:

> "*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 light of its objectives and purpose."*

61. Good Faith Interpretation

Interpreting treaties in "good faith" is a basic and fundamental principle under Article 31 of the Vienna Convention on the Law of Treaties ("the Vienna Convention"). The notion "good faith" signifies first, a presumption that the provisions and terms of the Treaty under interpretation, were intended to mean something; rather than nothing—**see Minority Opinion in the Iran - US Claims Arbitration (1981) International Law Reports (ILR) 62 (1992) 603; JACOBS: International & Comparative Law Quarterly (ICLQ) 18(1969) 333**.

62. Secondly, " good faith" requires the Parties to a Treaty to act honestly, fairly, and reasonably; and to refrain from taking unfair advantage--see **Interpretation of the Algerian Declaration of 19th January 1981 by the Iran – US Claims Tribunal, International Law Reports (ILR) 62 (1982) 605f (" spirit of honest and respect for law"**).

63. Thirdly, the notion "good faith" prevails throughout the process of interpretation – see YASSEN, RC 151 (1976 III) 22f. In this regard, the **Commentary on the 1969 Vienna Convention on the Law of Treaties by Mark E. Villiger, Martinus Nijhoff Publishers (2009) at page 426**, expounds on this element of good faith as follows:

> "*Good faith prevents an excessively literal interpretation of a term by requiring consideration of its context (N.9) and of other means of interpretation. In particular, good faith implies consideration of the object and purpose of a treaty (N.12). It plays a part in establishing the 'acceptance' in subpara. 2(b)(N.19) and in evaluating subsequent practice as in subpara. 3(b)(N.22). Finally, good faith assists in determining recourse to the supplementary means of interpretation in Article 32 (q.v., N.11)."*

64. From the application of the above-quoted "good faith" principles, we cannot find any impropriety that was allegedly committed by their Lordships of the First Instance Division in their interpretation of any of the provisions of the EAC Treaty. Consideration of a Treaty's objectives and purpose, together with good faith will assure the effectiveness of the terms of that Treaty. In the instant case, the Appellant would have the Summit's powers (on the process of Political Federation) limited to giving directives only to

the Council of Ministers — and not to the Secretariat or to any other organ or person. That interpretation calls for an overly literal and strict reading of Article 123(6) (i.e. *jus scriptum*) -- one which calls for a reading of the Article selectively and in isolation from all other provisions of the Treaty. Such interpretation (while not invalid *per se*), would nonetheless drastically constrain and unjustifiably constrict the reasonable and logical exercise of the sovereign powers of the Summit under the Treaty.

65. In the same vein, and given the entire scope of the EAC Treaty, as well as the objective and purpose of that Treaty (to effect Economic Integration and, ultimately, a Political Federation of East Africa), the Summit (as Pilot of that mammoth vessel of Integration) must be allowed appropriate flexibility, reasonable leeway and a meaningful **margin of appreciation** in the exercise of its powers under the Treaty – which a strictly literal and isolated reading of Article 123 (6) would not allow.

66. A more effective and good faith interpretation of that Article would require otherwise. The Court must seek the meaning of Article 123(6) – as, indeed, the meaning of all other Articles -- of the Treaty, from a more liberal, purposive and functional approach to interpretation. To this end, we agree with the emphasis of the **Commentary on the Vienna Convention** (*supra*) at page 428 that:

> *"As the ILC Report 1966 expounded: "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effect, good faith and the object and*

purposes of the treaty demand that the former interpretation should be adopted— [see YBILC 1966 II 219, para.6]".

67. We find that the First Instance Division, in its interpretation of the Treaty, did indeed adhere to the above-quoted terms and principles of the Vienna Convention; and did faithfully consider the underlying objectives, and purpose of the East African Community Treaty as the guiding principles for the interpretation of the various provisions of the Treaty.

68. Accordingly, the Appellant fails on Issue No. 2.

69. Issue No. 3: Whether the First Instance Division in reaching its Judgment, failed to consider the Appellant's Submissions and Arguments in Paragraph 7, 8, 9 and 11 of the Reference?

The Appellant contended very vigorously that the learned Judges did dispose of his Reference without addressing his arguments, submissions and documents. When asked by this Court for better elucidation of his contention, the Appellant made it manifestly clear that it was not a question of mere "marginalization" of his arguments and submissions by the First Instance Division; but rather, that Court's outright refusal or failure to address his arguments at all.

70. This alleged ignoring of a Party's arguments, if true, would be fatal to the exercise of their Lordships' discretion in conducting the Reference, let alone affording the Parties a fair hearing and trial. The cardinal rule being that to have legitimacy, trials must be fair, and the Court's discretion must be exercised judiciously.

71. Accordingly, we did set out to examine their Lordships' Judgment of 17th May 2013, as well as the entire Court Record and allied documentation of the First Instance Division, exhaustively, diligently, meticulously and conscientiously, with a view to establish whether the trial was fair; and whether the Court exercised its discretion judiciously. Our efforts have yielded the following.

72. Right from the outset of their Judgment, their Lordships of the First Instance Division affirmed categorically that:

> "*21. We have read the following documents on record:*
>
> *(i) The Reference titled 'Application dated 12th January 2012'*
>
> *(ii) The Response to the Reference together with the Affidavit in support, both dated 28th February 2012.*
>
> *(iii) The Reply to the Response dated 20th March 2012.*

(iv) The Response to the Reply to the Response dated 8th May 2012.

(v) Applicant's written submission filed on 13th February, 2013.

(vi) Respondent's written submission filed on 14th March 2013.

(vii) Applicant's rejoinder to the Respondent's written submission filed on 15th April 2013.

22. We have also taken into account the annextures to the documents placed before us including the Communiqué under attack, the Communiqué issued after the 14th Summit, the Report of the 11th Meeting of the Sectoral Council on Legal and Judicial Affairs, the Report of the 20th Meeting of the Council of Ministers, the draft Protocol on Immunities and Privileges of the East African Community, its Organs and Institutions, the Headquarters Agreement between the Government of Kenya and the Community for the Lake Victoria Basin Commission, and the Headquarters Agreement between the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda."

73. Such was the solemn statement expressed by the Court as it embarked upon writing its Judgment in the Reference. We have no reason to doubt the accuracy, nor the sincerity of that judicial statement. The Appellant provided no scintilla of proof to the contrary. All he stated was a generalized accusation of their Lordships' failure, without any proof of his

contention whatsoever. In any event, be that as it may, we set out to test the veracity of their Lordships' statement.

74. We searched, page by page, paragraph by paragraph, of their Lordships' Judgment for proof of their having addressed the Appellant's arguments, etc. We established the following:

In paragraph 25 of the Judgment, the Court made the following undertakings:

> "*All the above documents together with the Treaty will also form the basis for our opinion which we now render as follows:-"*

In paragraph 29, the Court stated that:

> *"We heard the Applicant to be arguing that privileges and immunities are not areas of co-operation and that under Article 138, only Agreements with Partner States can address those issues. With respect, we disagree with him. We say so because he has taken a very narrow view of what the Treaty sets out as "areas of co-operation". He has also completely failed to note that Chapter 27 of the Treaty is headed "Co-operation in other Fields" and Article 131, the only Article in that Chapter is titled, "Other Fields"…"*

In paragraph 33, the Court stated:

> *"The Treaty provisions must be read as complimentary to each other and not (as per the Applicant's line of argument) be seen as independent and in conflict with one another. To argue otherwise would lead to a legal absurdity and a negation of the principle that the Treaty must be interpreted as a whole and not selectively to suit a set purpose."*

In paragraph 34, the Court stated that:

> "*We heard the Applicant to argue that the issue of immunities and privileges cannot be one amounting to co-operation because it is personal to the employees of the Community. "**Co-operation**" is defined in **Black's Law Dictionary**…"*

In Paragraph 36, the Court wrote:

> *"…Article 2(a) and (b) of the Proposed Protocol address that provision [i.e. Article 138 (1] while Article 2(c) above is in furtherance of Article 138 (2) and (3) which the Applicant latched onto his submissions."*

In paragraph 42, the Court stated thus:

"*The Applicant's argument in this regard is that by mandating the Secretariat to "**propose an action plan**" and a "'**draft model of the structure of the East African Political Federation'**", the Summit acted in breach of the operational principles of the Community (Article 7) and the '**General undertaking as to implementation'** of the Treaty (Article 8) as well as, specifically, Article 123 (6) aforesaid."*

In paragraph 43, the Court stated:

"*We agree with the Respondent that the Applicant's argument on this issue [of mandating the Secretariat] is misguided. We say so, with respect, because as shall be seen later, initiation of the process of Political Integration and eventual Political Federation was not made at the 13th Summit, but much earlier…"*

In paragraph 44, the Court countered the proposition that the Secretariat was "initiating" or "undertaking" the actual process "as alleged by the Applicant."

In paragraph 47, the Court agreed with the Respondent (and, therefore, disagreed with the Applicant), regarding the nature of the "directions given to the Secretariat".

75. It is more than evident from all the above quotations and other references in the Judgment of the First Instance Division, that the Learned Judges had before them a hefty and veritable load of the Appellant's material to tackle. They did, indeed, address the Appellant's arguments virtually in their entirety – certainly all the arguments that were of import to the various holdings that the Court then proceeded to make. Each argument was addressed, discussed, analyzed, weighed, and weighted against competing arguments, before being accepted as logical and applicable; or denied and discarded as being inappropriate or inapplicable to the Reference. To state, therefore, as the Appellant now does, that the First Instance Division failed, refused or otherwise marginalized or ignored his arguments is, at best, mischievous; and, at worst, economical with the truth, distortionary of the actual position, and overly misleading to this Court. There is not the tiniest speck of truth, nor the slightest spike of a basis on which to peg that allegation. Therefore, the Court dismisses it.

Closely allied to the above generalized allegation, was a more specific complaint. One, that deserves detailed attention by this Court.

76. In ground 5 of the Memorandum of Appeal, the Appellant complained that the First Instance Division erred in law and in fact in determining the second issue in favour of the Respondent without taking into account the

Appellant's written submission that the Respondent's silence (both in the pleadings and in the submissions) in relation to paragraphs 7, 8, 9 and 10 of the Reference, meant admission of the facts contained therein.

77. That complaint was obviously grounded in Rule 43 of this Court's Rules of Procedure, which provides as follows:

> "*43. (1) Any allegation of fact made by a party in a pleading shall be deemed to be admitted by the opposite party unless it is denied by the opposing party in the pleading.*
>
> *(2) A denial may be made either by specific denial or by a statement of non-admission and either expressly or by necessary implication.*
>
> *(3) Every allegation of fact made in a pleading which is not admitted by the opposite party shall be specifically denied by that party; and a general denial or a general statement of non-admission of such allegation shall not be a sufficient denial."*

78. It is clear from the Rules that it is only allegations of fact which are made in pleadings by a party and are not denied by the adverse party which are deemed to be admitted. It is, therefore, necessary to determine:

1) whether the Appellant's allegations made in paragraphs 7, 8, 9 and 10 of the Reference were allegations of fact; and
2) if so, whether they were denied by the Respondent.

79. Those paragraphs of the Reference were framed in the following terms:-

> *"7. That under the provisions of Article 123(6) of the Treaty the process towards the establishment of a political federation of the Partner States can only be undertaken by the Council and not by the Secretariat as directed by the 13th Summit.*
>
> *8. That by mandating the Secretariat to do the named activities and submitting the proposal to the Summit for consideration, the Summit impliedly and explicitly excluded the Partner States and the Council from the process of spearheading the processes important for the establishment of the East African Federation.*
>
> *9. The Applicant is aggrieved by the cited directives of the Summit and believes that if they are not rectified; the Treaty for the establishment of the East African Community shall be irrevocably breached.*
>
> *10. The Applicant is further aggrieved by the fact that the directives were made by the highest organ of the Community, thus*

setting a very dangerous precedent for future decisions and directives of the other organs of the Community."

80. In our appreciation, the above-quoted paragraph 7 is an outright averment by the Appellant of a point of law, not of fact. It was therefore not imperative for the Respondent to traverse it specifically. Paragraphs 8, 9 and 10, on the other hand, are in our further appreciation, expressions of opinion, not of fact. Accordingly, there was, again, no necessity to traverse them. Be that as it may, we have read with care the Respondent's response to the Reference, as well as his written submissions in this Appeal. We find that in effect, the substance of those paragraphs was responded to by paragraphs 6, 7, 8 and 11 of the Respondent's response. Accordingly, there was an implicit denial within the meaning of Rule 43 (3) of this Court's Rules. The upshot of all this, is that howsoever we examine this element of the Appellant's complaint, it is without merit.

81. Thus, the Appellant fails on all aspects of Issue No. 3.

82. Issue No. 4: Whether the Appellant is entitled to the Remedies sought?

In his prayer for reliefs, the Appellant sought sundry declarations by this Court concerning alleged breaches, violations and infringements of diverse

provisions of the EAC Treaty by the Summit. He also sought an award of personal damages in the amount of US Dollars 60,000. The issue is whether he is entitled to those reliefs?

83. Given the findings on all the issues set out above, we can be relatively brief in the disposal of Issue No.4. First, the prayers for the respective declarations sought cannot succeed – given the Appellant's failure on all the substantive issues concerned. Second, the underlying Reference giving rise to this Appeal – like the overwhelming majority of References that are typically brought before this Court – was grounded not in tort or in contract. Accordingly, the question of an award of the kind of damages for personal injury now claimed by the Appellant, does not and cannot arise. The Appellant's claim of USD Dollars 60,000 damages for emotional loss and mental anguish arising from the Summit's alleged infringement of the EAC Treaty is misconceived.

84. In any event, as explained above, the Appellant having failed on all the other issues raised in this Appeal, cannot succeed on the issue of any of the remedies and reliefs sought.

VI. CONCLUSION

85. In the result, the Appeal is dismissed. Each Party shall bear its own costs; both in this Division and in the First Instance Division.

It is so ordered.

DATED AT ARUSHA, this …….. day of November, 2014

HON. JUSTICE LIBOIRE NKURUNZIZA

VICE PRESIDENT

HON. JUSTICE JAMES OGOOLA

JUSTICE OF APPEAL

HON. JUSTICE AARON RINGERA

JUSTICE OF APPEAL