IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA
APPELLATE DIVISION

(Coram: Emmanuel Ugirashebuja, P; Liboire Nkurunziza, VP; James Ogoola, JA; Edward Rutakangwa, JA; Aaron Ringera, JA)

CASE STATED NO.1 of 2014

[*ARISING FROM MISCELLANEOUS APPLICATION No. 558 OF 2012 IN CIVIL SUIT NO. 298 OF 2012 OF THE HIGH COURT OF UGANDA AT KAMPALA- CIVIL DIVISION]*

REFERENCE FOR A PRELIMINARY RULING UNDER ARTICLE 34 OF THE TREATY MADE BY THE HIGH COURT OF THE REPUBLIC OF UGANDA IN THE PROCEEDINGS

BETWEEN

THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA

AND

TOM KYAHURWENDA

31st July, 2015

PRELIMINARY RULING

I. INTRODUCTION

1. The present Preliminary Reference arose out of a Miscellaneous Application before the High Court of the Republic of Uganda ("the High Court") arising from Civil Suit No. 298 of 2012 between Tom Kyahurwenda and The Attorney General of Uganda. The High Court stayed the proceedings pending the preliminary ruling of the East African Court of Justice ("the Court").

2. On 2nd October 2012, Mr. Tom Kyahurwenda ("the Plaintiff"), lodged the above civil suit against the Republic of Uganda ("the Defendant"), in which he averred that the actions of the Defendant in the set of facts presented before the High Court were a breach of Articles 6, 7, 8 and 123 of the Treaty Establishing the East African Community (hereinafter called "the Treaty).

3. As a result, the Plaintiff sought, among others an Order of enforcement of the provisions of the EAC Treaty and of the EAC Act 13/2002, and of the state obligations of the Republic of Uganda through redress of the Plaintiff's injury, loss, and damage consequent upon the breach of, and non-compliance with the Treaty and the EAC Act. In this regard, the Plaintiff prayed for the following specific reliefs :

a) An Award of adequate compensation and atonement for the breach and consequent injury, loss and damage; and

b) Institution of measures and mechanisms to deter a repeat and recurrence of similar acts, commissions and omissions of breach and non-compliance of the EAC Treaty and EAC Act by State

agents, workers, officials and servants of the Government of Uganda.

4. On 6th December 2012, the Attorney General of Uganda, made an application for Orders that:-

    a) *The High Court "be pleased to make a declaration that in the circumstances of the case the court has no jurisdiction over the Defendant in respect of the subject matter of the claim or the relief or remedy sought by the Plaintiff in the action."(sic)*

    b) *Or, in the Alternative, the High Court "be pleased to issue an order transmitting the following questions certified as a Case Stated requesting the East African Court of Justice to give a preliminary ruling on:*

        i) *Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 are justiciable in the National Courts of Partner States; and,*

        ii) *Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty confer sufficient legal authority on the National Courts of Partner States to entertain matters relating to Treaty violations and award compensation and/or damages against a Partner State*.

5. On 17th November, 2014, the High Court of Uganda, by means of a Consent Order, referred to the East African Court of Justice, for a preliminary ruling the following two questions:

a) *Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 are justiciable in the National Courts of Partner States; and,*

b) *Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are self-executing and confer sufficient legal authority on the National Courts of the Partner States to entertain matters relating to Treaty violations and to award compensation and/or damages as against a Partner State.*

6. In accordance with the Sixth Schedule provided for in Rule 76 of the East African Court of Justice Rules of Procedure 2013 (" Court Rules"), the Preliminary Reference from the High Court was notified by the Registrar of this Court to the Parties to the Civil Suit, to all the Partner States, and to the Secretary General of the East African Community ("the Secretary General").

7. Pursuant to subsection (3) of the Sixth Schedule of the Court Rules, written observations were submitted to the Court by the United Republic of Tanzania, the Republic of Uganda, the Republic of Kenya and the Secretary General.

8. As per subsection (4) of the Sixth Schedule, the written observations were served on the Parties, all the Partner States and the Secretary General.

9. At the hearing, on 24th May, 2015, the oral observations of the Republic of Kenya, the United Republic of Tanzania, the Republic of Uganda, and the Secretary General were entertained. The Republic of Kenya, sought from the Court, permission to submit a supplementary

written observation. The Court granted the permission for the submission within a prescribed time. The Republic of Kenya submitted the supplementary written observations.

ARGUMENTS AND OBSERVATIONS OF THE PARTICIPANTS

a) The First Question

10. The Republic of Uganda posits that the starting point is determining whether the national courts ne have interpretative jurisdiction over the EAC Treaty.

11. The Republic of Uganda contends that the national courts do not have interpretative jurisdiction over the EAC Treaty. Uganda asserts that *"interpretation of the Treaty is a preserve of this Court (the EACJ) unless where the Treaty has conferred such a jurisdiction to the organ of the Partner State".*

12. Uganda contends that Article 27 of the Treaty is "instructive on this matter". Uganda further maintains that it was not the intention of the framers of the Treaty to confer interpretative jurisdiction on the national courts.

13. Furthermore, Uganda argues that the *raison d'etre* of Article 34 of the Treaty is to allow national courts to entertain matters that concern enforcement of the Treaty, but not interpretation, which falls under the sole purview of the East African Court of Justice.

14. The Tanzanian Government deemed it necessary to undertake a review of Articles 6, 7, 8 and 123 reading them together with Article 27 and Article 33 and came up with a conclusion similar to that of

Uganda that it is only the East African Court of Justice which has the sole mandate of interpreting the Treaty.

15. The Kenyan Government delved in detail to define the term **"justiciable"** for purposes of question one. Kenya relied on Black's Law Dictionary which defines **"justiciability"** as *"proper to be examined in courts of justice"*. Kenya further relied on the same dictionary to define **"justiciable controversy"** as *"a controversy in which a claim or right is asserted against one who has an interest in contesting it"* or *"a question as may properly come before a tribunal for decision".*

16. Kenya has also availes to the Court case law which has sufficiently dealt with the issue of **"justiciability"**. In ***Patrick Ouma Onyango & 12 Others v the Attorney General & 2 Others, Misc. App. No. 677 of 2005***, the High Court of Kenya endorsed the doctrine of **Justiciablity** as stated by Lawrence H. Tribe in his book entitled **« American Constitutional Law, 2nd Edition »**, p. 92 that:-

> *In order for a claim to be justiciable…, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted… Finally related to nature of the controversy is the 'political question' doctrine, barring decisions of certain disputes best suited to resolution by other government actors.*

17. Kenya also ventures into the long-standing debate on the applicability of international law *vis-à-vis* the monist and dualist legal systems and concludes that different Partner States embrace

different legal systems and that the Court should determine applicability of the Treaty on the basis of the type of legal system.

18. Kenya finally concludes that generally speaking the Treaty for the East African Community is justiciable before her national courts.

19. However, Kenya contends that it is *"imperative to consider the contents of specific Articles raised to ascertain whether they are justiciable before national courts."* Kenya opines that Articles 6, 7, and 8 of the Treaty play important functions *"because they are indicators of Partner States' compliance with the integration agenda"* and that *"they impose upon Partner States an obligation to adhere to them failing which the integration would not be possible".* Kenya further maintains that the above Articles 6, 7 and 8 should be treated under the *"political question"* doctrine *"which bars the National Courts from rendering decisions on the same and it is best suited to resolution by other governmental actors as it is hinged upon political will and formulation of policies by the Partner States"*.

20. Kenya, hence, concludes that *"provisions of Articles 6, 7, 8, and 123 read together with Articles 27 and 33 of the Treaty are not justiciable in the National Courts of Partner States"*.

21. In her supplementary submission, Kenya maintains that generally speaking the Treaty is justiciable in her National Courts. Kenya submits that Article 34 of the Treaty establishes a preliminary procedure mechanism *"through which national courts of member states can refer matters touching on the interpretation and application of the Treaty on validity of Community regulations and undertakings for interpretation to the East African Court of Justice."*

22. Kenya further posits that *"national courts in their own right thus occupy a central place in the integration process"* and that *"through adjudication of disputes arising from Partner States… national judiciaries complement the EACJ's role in maintenance of the rule of law within the Community generally; a vital ingredient to the success and sustainability of the integration process"*, hence, *"the effectiveness of the EACJ, therefore, to a great extent depends on its relationship with the national courts."*

23. Kenya also illustrates through a comparative approach, the similarities of the preliminary reference mechanism in the European Community Treaty and in the EAC Treaty, and concludes that Community laws are justiciable before national courts of Partner States.

24. The Secretary General submits that it is clear that Article 27 vests the East African Court of Justice with jurisdiction to interpret and apply the Treaty. The Secretary General furthermore maintains that the EACJ has on several occasions held that Articles 6, 7, and 8 are justiciable. In support of his position, the Secretary General cites the following cases: ***James Katabazi and 21 Others v. Secretary General of the East African Community and the Attorney General of Uganda,*** EACJ Reference No. 5 of 2007, ***Samuel Mukira Mohochi v. Attorney General of Uganda,*** EACJ Reference No. 5 of 2011, ***Attorney General of the Republic of Rwanda v. Plaxeda Rugumba,*** EACJ Appeal No. 1 of 2012 and ***Attorney General of Uganda v. Omar Awadh and 6 Others,*** EACJ Appeal No.2 of 2012).

25. The Secretary General considers that Article 33(2) which provides that *"decisions of the Court (EACJ) on the interpretation and*

application of the Treaty shall have precedence over decisions of national courts on similar matter", is illustrative of the fact that national courts can entertain cases *"involving interpretation and application of the Treaty with the caveat that should a decision of the EACJ conflict with the decision of a national court on a similar matter of interpretation or application of the Treaty, the decisions of the EACJ shall prevail"*.

26. The Secretary General takes the view that Article 34 of the Treaty entitles national courts to interpret and apply the Treaty. The Secretary General further opines that Article 34 provides national courts discretion on whether to make a preliminary reference or not due to its wording *"if it considers that a ruling on the question of interpretation or application of the Treaty is necessary to enable it to give judgment."*

27. In as far as Article 123 of the Treaty is concerned, the Secretary General holds that the Article is neither justiciable before national Courts nor before the East African Court of Justice. This is due to the fact that its Paragraph 5 provides for its operationalisation when the Council *"prescribes in detail how the provisions of the Article shall be implemented"*. In other words, the Article spells out the objectives that will form part of the common foreign and security policies.

b) **Second Question**

28. As earlier pointed out, Uganda did not dwell on answering the questions as stated but preferred to inquire whether national courts possessed interpretative jurisdiction of the Treaty and concluded that they did not have the jurisdiction.

29. Tanzania posits that the applicability of the Treaty largely depends on the extent to which it has been domesticated in a given Partner State. According to Tanzania, Treaties, including the EAC Treaty, are not self-executing in her jurisdiction, unless an Act of Parliament makes them operative.

30. Kenya, submits that the second question was similar to the first question and that the submissions for the first question are relevant to the second question.

31. The Secretary General also holds that the answers to the first question are similar to the answers to the second question.

32. On the issue of the possible award of compensation, the Secretary General points out:-

> *[i]t is trite law that compensation is always awarded by courts against established damages suffered by the beneficiary of such compensation. Compensation is also awarded by measuring the amount of suffering or loss endured by its beneficiary. Needless is to mention that this Honourable Court (the EACJ) has had, at the end of substantive litigation over interpretation and application of the Treaty, several occasions where compensation against losses and costs was awarded. This Court (the EACJ) has also had an occasion where it refused to award an application for interim injunction basing its argument on the fact that the applicant had failed to prove that the preempted injury to reputation could not be compensated by money* **(See *Rt. Hon. Margaret Zziwa v. Secretary General of the East African Community,*** EACJ

Application No. 23 of 2014 arising out of Reference No. 2 of 2013**).**

Similarly, national Courts, at the end of a litigation process that has involved interpretation and application of Community laws, may award compensation to a person that has suffered damage or injury as a result of violation of those laws by a Partner State.

THE COURT'S ANALYSIS AND FINDINGS

33. The Court is mindful of the fact that it has on several occasions had an opportunity to apply rules of the Vienna Convention of 1969 on the Law of Treaties in interpreting the provisions of the EAC Treaty. The rules of interpretation of the Vienna Convention that the Court has resorted to in case of interpretation of the EAC Treaty provisions are Articles 31 and 32 of the Convention. The Articles provide:-

Article 31:

General rule of Interpretation:

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

2. *The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:*

   (a)Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the Treaty.

   (b)Any instrument which was made by one or more parties in connection with the conclusion of the treaty.

3. *There shall be taken into account, together with the context:*

   (a)Any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions;

   (b)Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

   (c) Any relevant rules of international law applicable in the relations between the parties.

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

Article 32:
Supplementary means of interpretation

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

(a)Leaves the meaning ambiguous or obscure; or,

(b)Leads to a result which is manifestly absurd or unreasonable.

The Court has not lost sight of the indisputable fact that Art. 31 and 32 of the Vienna Convention reflect pre-existing customary international law and can be applied as valid canons of interpretation to treaties such as the EAC Treaty. (See, also ***Territorial Dispute (Libyan Arab Jamahiriya/Chad)***, Judgment, ICJ Reports 1994, pp.

21-22, para. 41; ***Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia, Malaysia)***, Judgment, ICJ Reports 2002, p. 625 at pp. 645- 46, paras 37-8; ***Case Concerning Kasikili Sedudu Island (Botswana/ Namibia)***, ICJ Reports 1999, p. 1059, para. 108.

34. Armed with the above review of the well established canons of interpretation of international treaties, the Court deems it necessary to dwell upon the broad and fundamental question posed by Uganda, whether the national courts have interpretative jurisdiction over the EAC Treaty, as a precursor to the specific questions posed in the Preliminary Reference by the High Court of Uganda. In other words, this Court will be answering the question **by what court(s) is the Treaty to be interpreted?**

35. In the present case, Uganda holds that the existence of Article 34 of the Treaty which provides for the preliminary reference mechanism read together with Article 27 and Article 33 of the same Treaty must be construed as only affording national courts the power to entertain matters that concern enforcement of the Treaty ; and bars the national Courts from interpreting the Treaty, which is the sole preserve of the EACJ. Tanzania also agrees with this position. The relevant parts of the above provisions are worded as follows:

Article 27

Jurisdiction of the Court

1. *The Court shall initially have jurisdiction over the interpretation and application of this Treaty:*

Provided that the Court's jurisdiction to interpret under this paragraph shall not include the application of any such jurisdiction conferred by the Treaty on Organs of Partner States.

2. *...*

Article 33

Jurisdiction of National Courts

1. *Except where jurisdiction is conferred on the Court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the Partner States.*

2. *Decisions of the Court on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter.*

Article 34

Preliminary Rulings of National Courts

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

36. The Court considers, first of all, that Article 27 of the EAC Treaty establishes a broad and general jurisdiction of this Court. There is nothing in that Article which purports to grant a monopoly of the interpretation jurisdiction to the EACJ, at the exclusion of any other entity including the national courts.

37. The Court observes that on the face of it, Article 33 (2), which provides that ***"Decisions of the Court on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter"***, appears to suggest that both the national courts and the EACJ do indeed possess the jurisdiction to "interpret and apply" the Treaty. This provision reinforces the view taken by the Secretary General that the Treaty, does not, in any way, afford the EACJ monopoly over its "interpretation" and "application". For why else would the Treaty establish a hierarchical order of precedence of decisions made by the national courts and the EACJ in the realm of its interpretation and application on **"a similar matter"**?

38. In order to answer the question, **by what courts is the treaty to be interpreted?** the Court deems it important at this juncture to examine the meaning and purpose of Article 34 of the Treaty which provides for the mechanism of the "preliminary reference".

39. Article 34 shows that if *"a question is raised before any court or tribunal of a Partner State concerning the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal shall"…* The departure point is that a question has to be raised before *"any court or tribunal"* and not any other entity. In determining what *"any court or tribunal"* is, for purposes of the mechanism of preliminary reference, the Court draws inspiration from the jurisprudence of the European Court of Justice [« ECJ »], which is also in possession of the mechanism. In the ***Pretore di Salo v. Persons Unknown,*** the ECJ held that it:

[h]as jurisdiction to reply to a request for a preliminary ruling if that request emanates from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law, even though certain functions of that court or tribunal in the proceedings which gave rise to the reference for a preliminary ruling are not, strictly speaking, of a judicial nature. ***(see, Case 14/86 [1987] ECR 2545).***

40. Inspired by the above ruling, this Court opines that for a national to be considered a "court or tribunal" for purposes of preliminary reference, the entity should possess the following attributes: established by law; have permanent existence; endowed with compulsory jurisdiction; have ability to entertain procedures *inter partes;* apply rules of law; and, be endowed with functional independence.

41. Article 34 of the Treaty further provides that where a court or tribunal is faced with *"... the interpretation or application of the provisions of this Treaty or the validity of the regulations, directives, decisions or actions of the Community, that court or tribunal* <u>*shall*</u> *[*emphasis ours*], if it considers that a ruling on the question is necessary to enable it to give judgment, request the Court to give a preliminary ruling on the matter"*. The provision uses the emphatic word **"shall"**. In the general scheme of legal drafting, the use of the word **"shall"** would presuppose that when the national courts or tribunals are faced with a question of interpretation, application or validity, they have no option, but to refer the matter to this Court.

42. However, the use of the phrase in Article 34 of the Treaty , ***"...if it considers it necessary that a ruling on the question is necessary to enable it to give judgment..."*** would appear to give credence to the view held by both the Secretary General and Kenya that the national courts or tribunals have "a wide margin of appreciation", to decide whether or not to refer the matter to this Court for interpretation and application of the Treaty.

43. It is incumbent upon this Court to determine the scope of discretion afforded to national courts and tribunals in Article 34.

44. The Court observes that in the absence of the phrase **"if it considers it necessary"**, and with the use of the emphatic word **"shall"**, then it would have been clear that the national courts and tribunals would have had no discretion whatsoever but to refer to this Court all matters of interpretation and application of the Treaty and validity of regulations, directives, decisions and actions of the Community. In that event, the logical question to pose would then be: **what is the nature of the discretion introduced by the above phrase, if it considers it necessary?** In answering that question, the Court finds guidance in the meaning and application of a similar provision which introduces the identical mechanism of preliminary reference in the European Community (EC) Treaty; and which was one of the major reference points when developing the EAC Treaty. Article 234 of the EC Treaty provides that:

Article 234

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;(b) the validity and interpretation of acts of the institutions of the Community...;(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member state, against whose decision there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

45. The Court notes that despite the similarities in the approach towards the mechanism of preliminary reference in both the EAC and the EC Treaties, Article 34 of the EAC Treaty is distinguishable from Article 234 of the EC Treaty in certain aspects. Article 234 of the EC Treaty makes a distinction where a question of interpretation and validity is raised before lower courts and before the courts of last resort in any given matter.

46. In the famous case of ***Bulmer v. Bollinger,*** Lord Denning, M.R. stated in reference to the then Article 177 (now 234 of the EC Treaty):

[T]hat Article shows that, if a question of interpretation or validity is raised, the European Court is supreme. It is the ultimate authority. Even the House of Lords has to bow down to it. If a question is raised before the House of Lords on the interpretation of the Treaty- on which it is necessary to give a

ruling- the House of Lords is bound to refer it to the European Court. Art 171(3) uses the emphatic word "shall". The House has no option. It must refer the matter to the European Court, and having done so, it is bound to follow the ruling in that particular case in which the point arises.

In as far as the lower courts are concerned, Lord Denning, M.R., in the same case above opined:

But short of the House of Lords, no other English Court is bound to refer a question to the European Court at Luxembourg. Not even a question on the interpretation of the Treaty. Art. 177(2) uses the permissive word "may" in contrast to "shall" in Article 177(3). In England, the trial Judge has complete discretion. If a question arises on the interpretation of the Treaty, an English Judge can decide it for himself. He need not refer it to the Court in Luxembourg unless he wishes.

47. On its part, Article 34 of the EAC Treaty, does not make any form of distinction between the hierarchy of national courts and tribunals. It lumps all the *"courts and tribunals"* together in the phrase *"any courts or tribunals".* Furthermore, the drafters of the Article opted to use the compulsive word *"shall",* rather than the permissive word *"may"*. The questions that come to the mind of the Court are two: what intention did the framers of the EAC Treaty habour in opting for the use of the emphatic *"shall"*, rather than the permissive *"may"?* and, what is the extent of the discretion conferred on national courts in Article 34 of the EAC Treaty?

48. It is of utmost importance to understand the significance of the preliminary ruling procedure. The procedure is the keystone of the

arch that ensures that the Treaty retains its Community character and is interpreted and applied uniformly with the objective of its provisions having the same effect in similar matters in all the Partner States of the East African Community. In the absence of this procedure, it is possible that legions of interpretation of the same Treaty would emerge drifting hither and thither, aiming at nothing. This would at best create a state of confusion and uncertainty in the interpretation and application of the Treaty ; and at worst, ignite an uncontrolled crisis which would destabilise the integration process. The situation could even be more disastrous were national courts and tribunals permitted to declare Community Acts, regulations, directives and actions invalid in the absence of a ruling to that effect by the East African Court of Justice.

49. In this vein, the ECJ, in Preliminary Ruling of ***Foto-Frost v Hauptzollamt-Ost*** (Case 314/85 [1987] ECR 419], held that even though Article 234 did not settle the question of whether national courts have the jurisdiction to invalidate a Community Act, the requirement of uniformity, which is the purpose of Article 234 is of particular imperative when the validity of a Community Act is at issue. The ECJ stated that:

> *Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.*

50. The Court holds that by resorting to the use of the word **"shall"** in Article 34 and having regard to the *raison d'etre* of the preliminary ruling procedure expounded above, it was the intent and purpose of

the framers of the Treaty to grant this Court the exclusive jurisdiction to entertain matters concerning interpretation of the Treaty and annulment of Community Acts.

51. The Court deems it important to distinguish the application of the Treaty from interpretation of the same as found in Article 34. Whereas, as we held above, interpretation is the preserve of this Court, the same is not necessarily the case for the application of the Treaty by the national courts to cases before them. It would defeat the purpose of preliminary reference mechanism if the Court's interpretation of Article 34 of the Treaty extended to "application of treaty provisions". The purpose for the mechanism is for the national courts to seek interpretation of the Treaty provisions in order that they may then apply them to a case at hand. Hence, to interpret Article 34 as requiring *"application of the Treaty provision"* to be excluded from the purview of national courts would ***"lead to a result which is manifestly absurd or unreasonable".*** In this regard, Article 32 (b) of the Vienna Convention on the Law of Treaties cited above acknowledges an absurdity exception to the literal interpretation of any Treaty.

52. The national courts seek interpretation from this Court in order to be empowered to apply the Treaty provisions to the facts of the case (s) before them.

53. Indeed, in the ***East African Law Society v. The Secretary General of the East African Community,*** the First Instance Division of this Court held that:

> *As Partner States, by virtue of their being the main users of the Common Market Protocol on a daily basis, it would be absurd and impractical if their national courts had no jurisdiction over disputes arising out of implementation of the Protocol. Indeed, Community law would be helpless if it did not provide for the right of individuals to invoke it before national courts.*

This view is fortified by the Decision of the Court of Justice of the European Union in ***Van Gend Loos*** [1963] CMLR 105 where the Court held that:

> *[t]he fact that Article 169 and 170 of the EEC Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not deprive individuals of the right to plead the same obligations, should the occasion arise, before a national court.*

54. This Court agrees with the postulation of the law by the First Instance Division of this Court that it would be absurd if national courts and tribunals were to be excluded from the application of Treaty provisions should the occasion arise before them.

55. The other fundamental question that requires the attention of this Court is: What is the extent of discretion conferred upon national courts by Article 34 of the Treaty?

56. As we understand it, the discretion afforded to national courts by Article 34 is the discretion to refer or not to refer a question of interpretation to this Court. However, the condition precedent to the exercise of this discretion is this: "**if** the national court or tribunal considers that a ruling on the question is necessary to enable it to

make a judgment…" Once a national court or tribunal considers an interpretation to be necessary, then it has no option but to refer the question to this Court. Hence, the discretion is narrow. It is confined to determining whether or not a ruling on the question is necessary to enable the court to make its judgment.

57. The Court is of the view that the discretion to determine whether a question is necessary or not will in the great majority of cases be exercised in favour of the ruling on the question being necessary, unless: the Community law is not required to solve the dispute **(an irrelevant question)**; or, this Court has already clarified the point of law in previous judgments **(*Acte eclair)***; or, the correct interpretation of the Community law is obvious **(*Acte clair)***.

58. This Court deems it apposite to draw attention to two points of fundamental importance. The first fundamental point is that this Court's preliminary ruling is binding on the national court or tribunal which has sought a preliminary ruling. The second fundamental point is that a preliminary ruling is binding ***erga omnes*** *(towards all)*. It is ***erga omnes*** in the sense that it is binding on all national courts and tribunals in all Partner States of the Community.

59. Thus far, the Court has held that Article 34 of the Treaty confers on this Court the exclusive jurisdiction to interpret the Treaty and to annul Community Acts. Now, the Court will turn to the task of unveiling the intention of the framers of the Treaty when they provided in Article 33 (2) that "***Decisions of the Court on the interpretation and application of the Treaty shall have precedence over decisions of national courts on a similar matter"***,

which appears to suggest that the national courts and the EACJ possess jurisdiction to "interpret and apply" the Treaty concurrently.

60. The only logical conclusion from a reading Article 33 (2) together with Articles 27 and 34 would be that the framers of the Treaty envisaged a situation where it is possible to contract out of the general norm of granting exclusive jurisdiction of interpretation of the Treaty to this Court; and to give instead, concurrent jurisdiction of interpretation on a given subject matter to both this Court and the national courts. In such case, the interpretation of this Court takes precedence.

61. Consequently, this Court concludes from the above that:

i) Reading Articles 27, 33 and 34 of the Treaty together, this Court has exclusive jurisdiction on the interpretation of the Treaty and invalidation of the Community Acts, directives, regulations or actions;

ii) The preliminary rulings of this Court are binding on all national courts and tribunals of all Partner States of the Community;

iii) The purpose of a preliminary ruling is to enable national courts to apply this Court's interpretation to the facts of a case before a national court; and to enable that court to make a judgment;

iv) If the Partner States have decided to contract out of the above general principle and accord concurrent jurisdiction in the Treaty to both this Court and the national courts and tribunals, the interpretation of this Court takes precedence over that of the national courts and tribunals on similar matters.

62. The Court now comes to the two questions referred to it by the High Court of Uganda. The first question raised is: Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are justiciable in the national courts of Partner States.

63. The Court notes that, Article 6 provides for the **Fundamental Principles of the Community**, Article 7 provides for the **Operational Principles of the Community, and** Article 8 provides for the **General Undertaking as to the Implementation.**

64. Throughout the ever expanding web of the Court case law one golden thread is always to be seen, the Court has held that the principles espoused by Article 6, 7, and 8 are justiciable. In ***Samuel Mukira Mohochi v. The Attorney General of Uganda (***EACJ Reference No. 5 of 2011, Judgment, 17 May 2013***),*** the First Instance Division of this Court rejected the argument by the Respondent that the principle of good governance provided for in Article 6(d) of the Treaty represents *"aspirations and broad policy provisions for the Community which are futuristic and progressive in application"*. The Division held that the EAC Partner States intended the Article to entail *"actionable obligations, breach of which gives rise to infringement of the Treaty"*. The Division further held that *"the framers of the Treaty went beyond stating the principle and instead negotiated and agreed upon a specific minimum set of requirements that constitute the good governance package".* The Division also held that:

> *It is clear to us that the provisions of Article 6 (d) of the Treaty are solemn and serious governance obligations of immediate, constant and consistent conduct by the Partner States. In our*

humble view, we know of no other provisions that embody the sanctity of the integration process the way the above do.

The Court is persuaded by the above elucidation of the law by the First Instance Division and affirms it.

In the same vein was the case of ***James Katabazi and 21 others v. The Secretary General and the Attorney General of Uganda*** *(EACJ Reference No. 1 of 2007, Judgment of 1st November 2007).* The subject matter of that case was an infringement of Articles 7(2), 8(1) and 6 (d) of the EAC Treaty and an infringement of Article 29 of the said Treaty by the intervention on the High Court premises of armed security agents of Uganda to prevent execution of a lawful court order. This Court held that: *"the intervention by armed security agents of Uganda to prevent execution of a lawful court order violated the principle of the rule of law and consequently contravened the Treaty".* (see also, ***Attorney General of the Republic of Rwanda v. Plaxeda Rugumba,*** EACJ Appeal No. 1 of 2012 and ***Attorney General of Uganda v. Omar Awadh and 6 Others,*** Appeal No.2 of 2012). We reaffirm this postulation of the law.

65. Certainly, the designers of the Treaty contemplated Articles 6, 7 and 8 as forming the fundamental and paramount Objectives, Principles and law of the Community. The preamble to the Treaty fortifies this view. It states:-

[A]ND WHEREAS the said countries, with a view to strengthening their co-operation are resolved to adhere themselves to the fundamental and operational principles that shall govern the achievement of the objectives set herein…

The Court is cognisant of the fact that a preamble is not binding in law. However, it forms a vital tool for the interpretation of the context and purpose of a Treaty provision **(see Article 31 (2) of the Vienna Convention on the Law of Treaties, cited above).** In other words, the section of the preamble cited above unequivocally provides that the Partner States have agreed to be bound by the Fundamental and Operational Principles which are to be found in Articles 6, 7 and 8 of the Treaty. Failure to do so constitutes a breach of the Treaty and an impediment to the achievement of its objectives.

66. This Court agrees with and affirms the view of the First Instance Division in the ***Mukira Case*** *(supra)* that the stiff penalties established in Articles 146 (1) and 147 (2) of the Treaty for any Partner State which, *"fails to observe and fulfil the fundamental principles and objectives of the Treaty"* or which grossly and persistently violates the *"principles and objectives of the Treaty"* is cogent evidence of the intention of the designers of the Treaty to make binding the provisions which articulate the principles and objectives of the Treaty, especially Articles 6 and 7; and to make their violation a breach of the Treaty.

67. The *chapeau* of Article 6 provides: *[T] he fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include:.* The use of the emphatic word « **shall »** is evidence that the designers of the Treaty intended Article 6 to be binding on Partner States. The same can be said of the *chapeaus* of Article 7 and Article 8.

68. These Fundamental Objectives and Fundamental Operational Principles of the Treaty are just that: truly fundamental- solemn,

sacred and sacrosanct. They are the rock foundation, upon which the solid pillars of the Treaty, the Community and the Integration agenda are constructed. They stand deeper, larger and loftier than "mere aspirations" that certain counsel for Partner States would make them out to be.

69. The Court, therefore, holds that Articles 6, 7 and 8 are justiciable both before this Court and before the national courts and tribunals.

70. As for Article 123 of the Treaty, even though it uses the imperative word **"shall"** in certain of its provisions, which **normally** denotes **"must"** or **"binding"** in legislative drafting its **operativeness** is partly, circumscribed by Article 123 (5).

71. Article 123 (5) provides: *[T]he Council shall determine <u>when</u> the provisions of paragraphs 2, 3 and 4 of this Article shall become <u>operative</u> and shall prescribe in detail how the provisions of this Article shall be implemented.* To the best of the knowledge of this Court, there is no such determination as yet.

72. The Court, therefore, holds that paragraphs 2, 3 and 4 of Article 123 are not **operative** yet; and, hence, not **justiciable** either before this Court or before the national courts or tribunals.

73. The second question is: Whether the provisions of Articles 6, 7, 8 and 123 read together with Articles 27 and 33 of the Treaty are self-executing and confer sufficient legal authority on the national courts of the Partner States to entertain matters relating to Treaty violations, and to award compensation and/or damages as against a Partner State?

74. The Court is fully satisfied that the answers to the first question are relevant to the first part of the second question posed in paragraph 73 (*supra)*. The Court has held that Articles 6, 7 and 8 of the Treaty are **justiciable** before national courts. Accordingly, those Articles do confer legal authority to the national courts of the Partner States to entertain allegations of their violation. However, the same cannot be said of Paragraphs 2,3 and 4 of Article 123 of the Treaty which is yet to be operationalised.

75. What remains then is whether compensation and/or damage can be awarded by national courts and tribunals against a Partner State that breaches Treaty provisions. This Court is of the view that national courts and tribunals are entitled to examine the facts of each case as against the Treaty provisions in order to determine whether or not there is a breach. Where a breach is established, it is for the national courts to determine whether there was damage, and what reliefs and remedies are justifiable and commensurate with the loss.

II. Costs

76. The costs incurred by the Secretary General and the Partner States which have submitted their observations to the Court in this Preliminary Reference are not recoverable. As these proceedings, in so far as the Parties to the suit are concerned, are a step in the action before the High Court of Uganda, the decision as to costs is a matter for that Court to pronounce in the context of the proceedings before it.

77. For these reasons,

THE COURT HEREBY RULES THAT:

a) **Article 34 of the Treaty for the Establishment of the East African Community grants this Court exclusive jurisdiction to interpret the Treaty and to invalidate Community Acts.**

b) **National courts and tribunals are entitled to entertain matters involving the violation of the Treaty and the application of the provisions of the Treaty within the context of Articles 33 and 34.**

c) **Decisions of this Court in the interpretation of the Treaty take precedence over decisions of the national courts and tribunals on similar matters.**

d) **Articles 6,7 and 8 of the Treaty are justiciable before the national courts and tribunals of the Partner States.**

e) **While they remain inoperative, Paragraphs 2, 3 and 4 of Article 123 of the Treaty are not justiciable both before this Court and before the national courts and tribunals.**

f) **The decision as to the costs in this Preliminary Ruling and as to the appropriate remedies is a matter for the High Court of the Republic of Uganda to pronounce in the context of the proceedings in the underlying suit before the High Court.**

DATED, DELIVERED AND SIGNED AT ARUSHA THIS 31ST DAY OF JULY 2015

.....
Emmanuel Ugirashebuja
PRESIDENT

.....
Liboire Nkurunziza
VICE PRESIDENT

.....
James Ogoola
JUSTICE OF APPEAL

.....
Edward Rutakangwa
JUSTICE OF APPEAL

.....
Aaron Ringera
JUSTICE OF APPEAL